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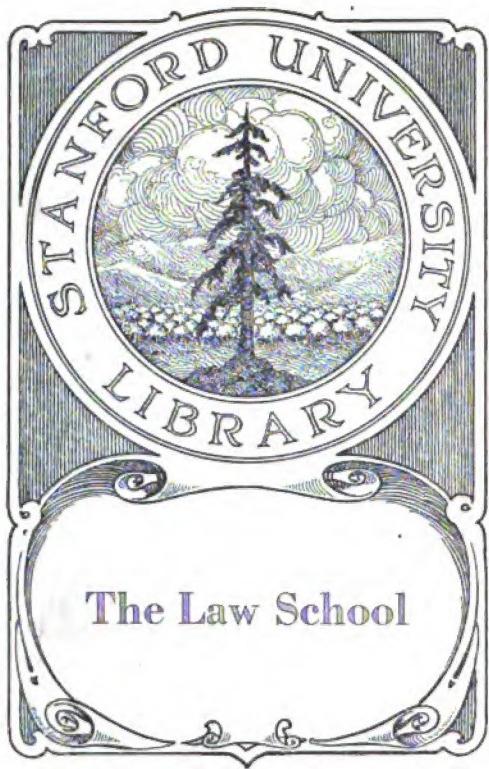
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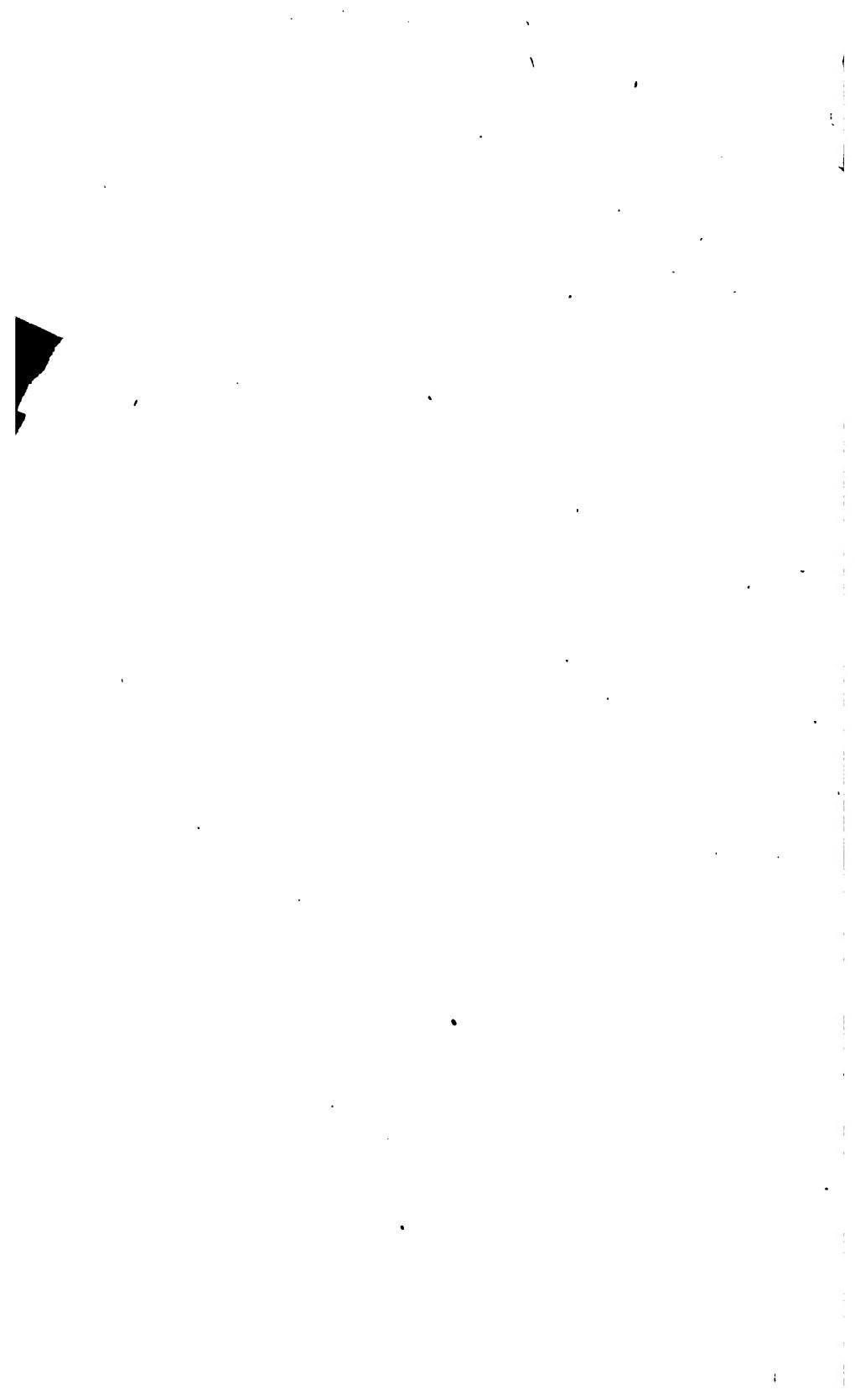
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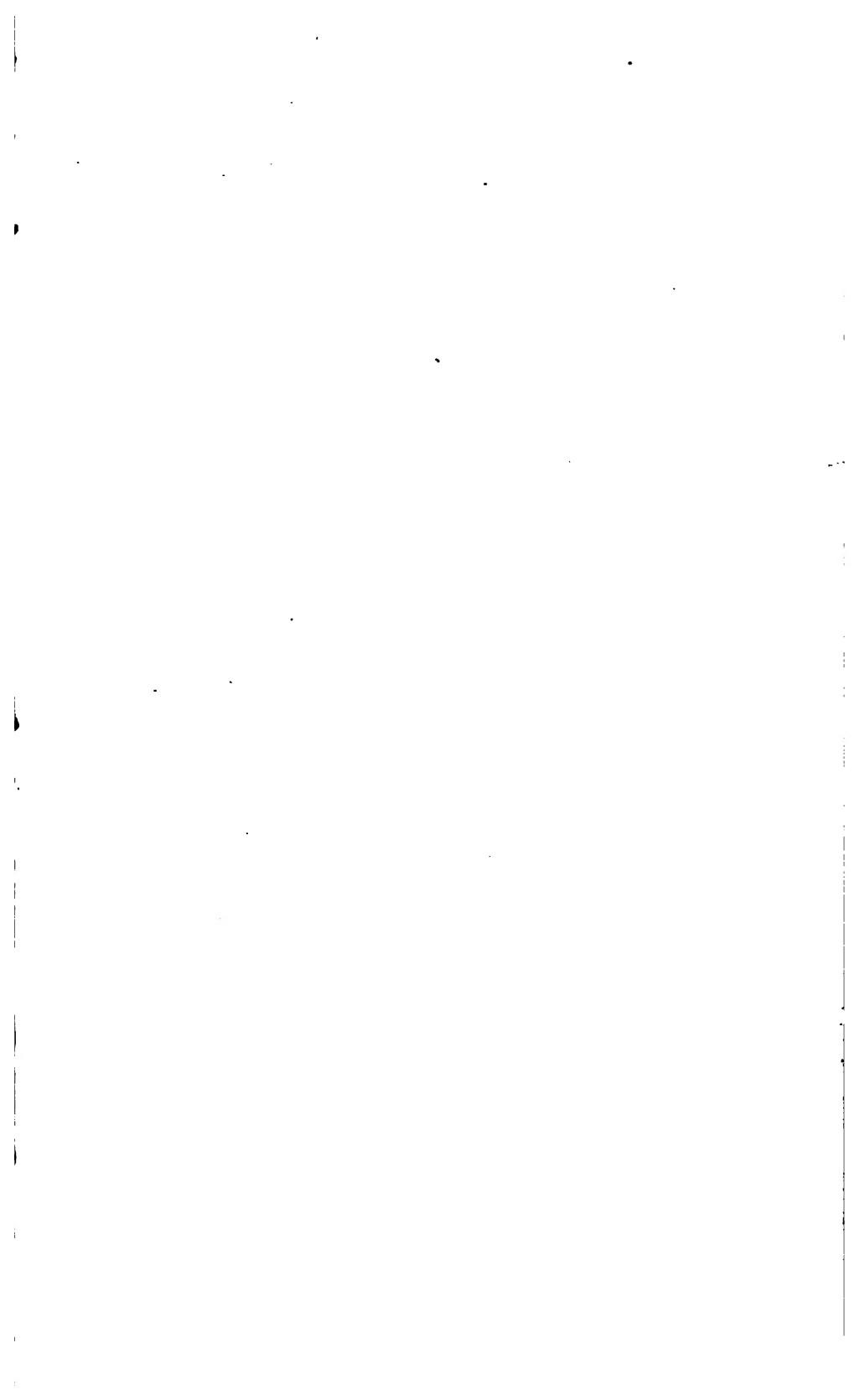
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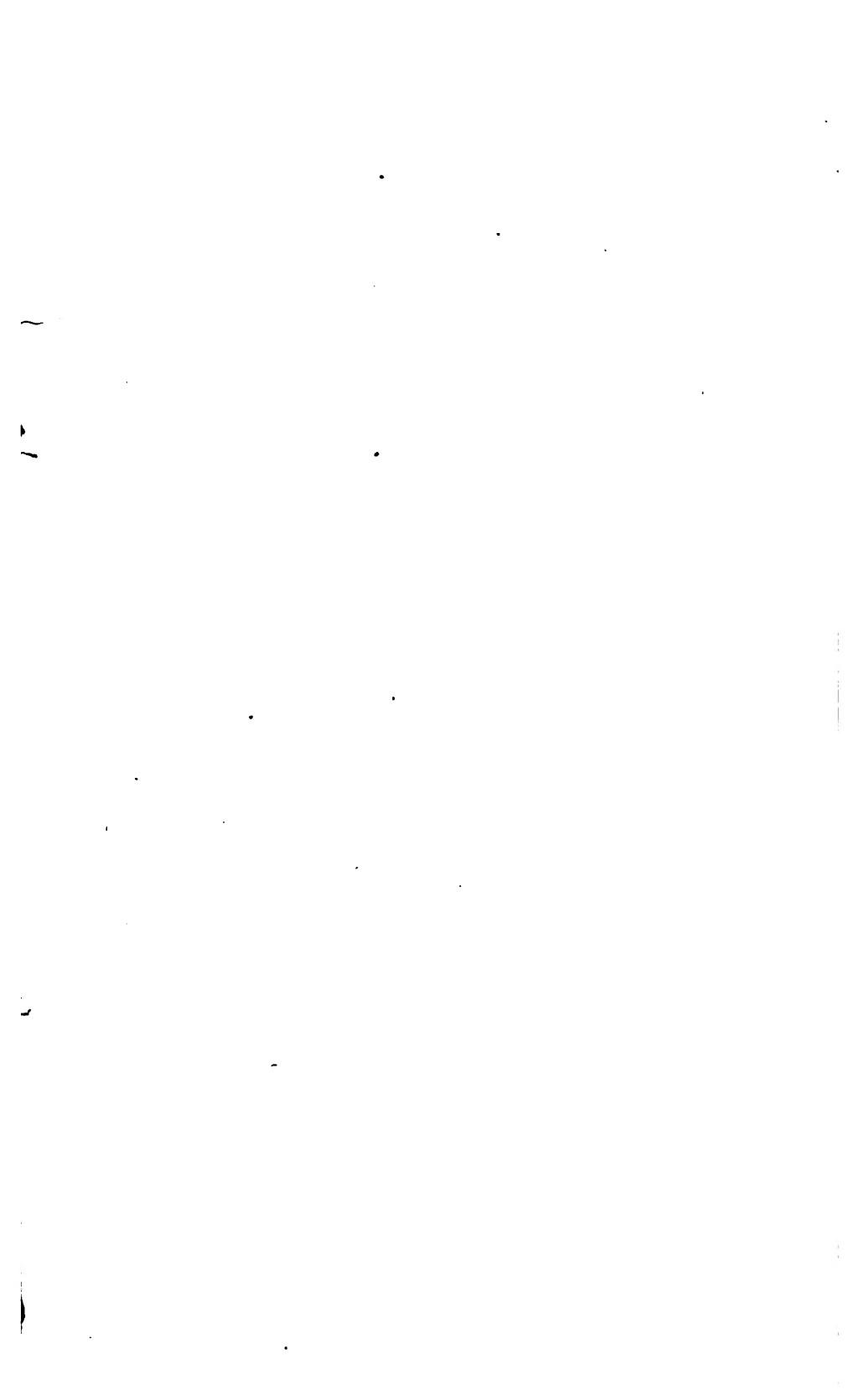












OFFICIAL OPINIONS
OF
THE ATTORNEYS-GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO THEIR OFFICIAL DUTIES,

AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN
GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY
A. J. BENTLEY, ESQ.

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VOLUME XIX.

CONTAINING
OPINIONS
OF
Hon. AUGUSTUS H. GARLAND,
OF ARKANSAS,
AND
Hon. WILLIAM H. H. MILLER,
OF INDIANA.

ALSO CONTAINING OPINIONS GIVEN
BY
Hon. GEORGE A. JENKS, of Pennsylvania,
Solicitor-General and Acting Attorney-General,
Hon. ORLOW W. CHAPMAN, of New York,
Solicitor-General and Acting Attorney-General,
AND
Hon. WILLIAM H. TAFT, of Ohio,
Solicitor-General and Acting Attorney-General.

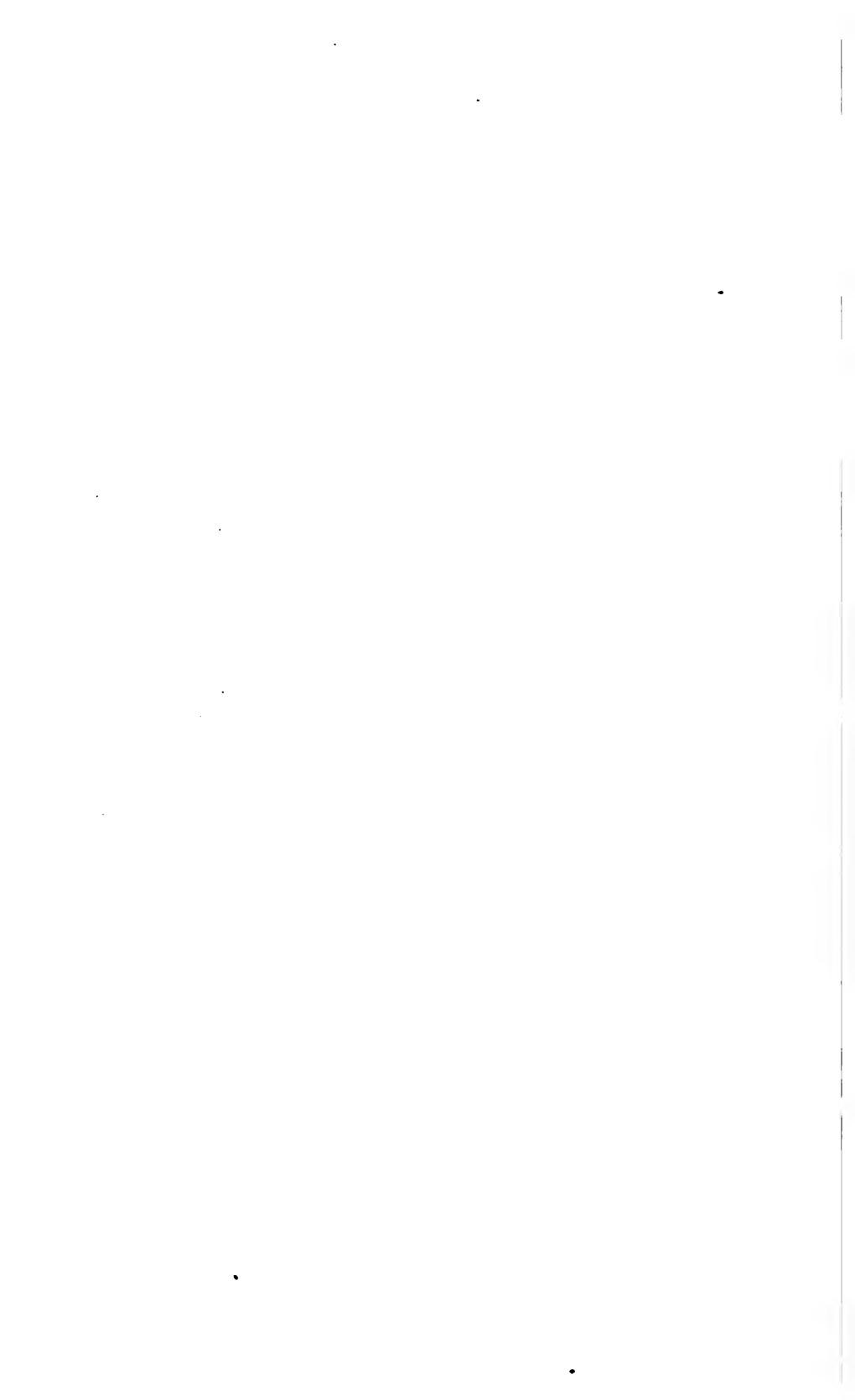


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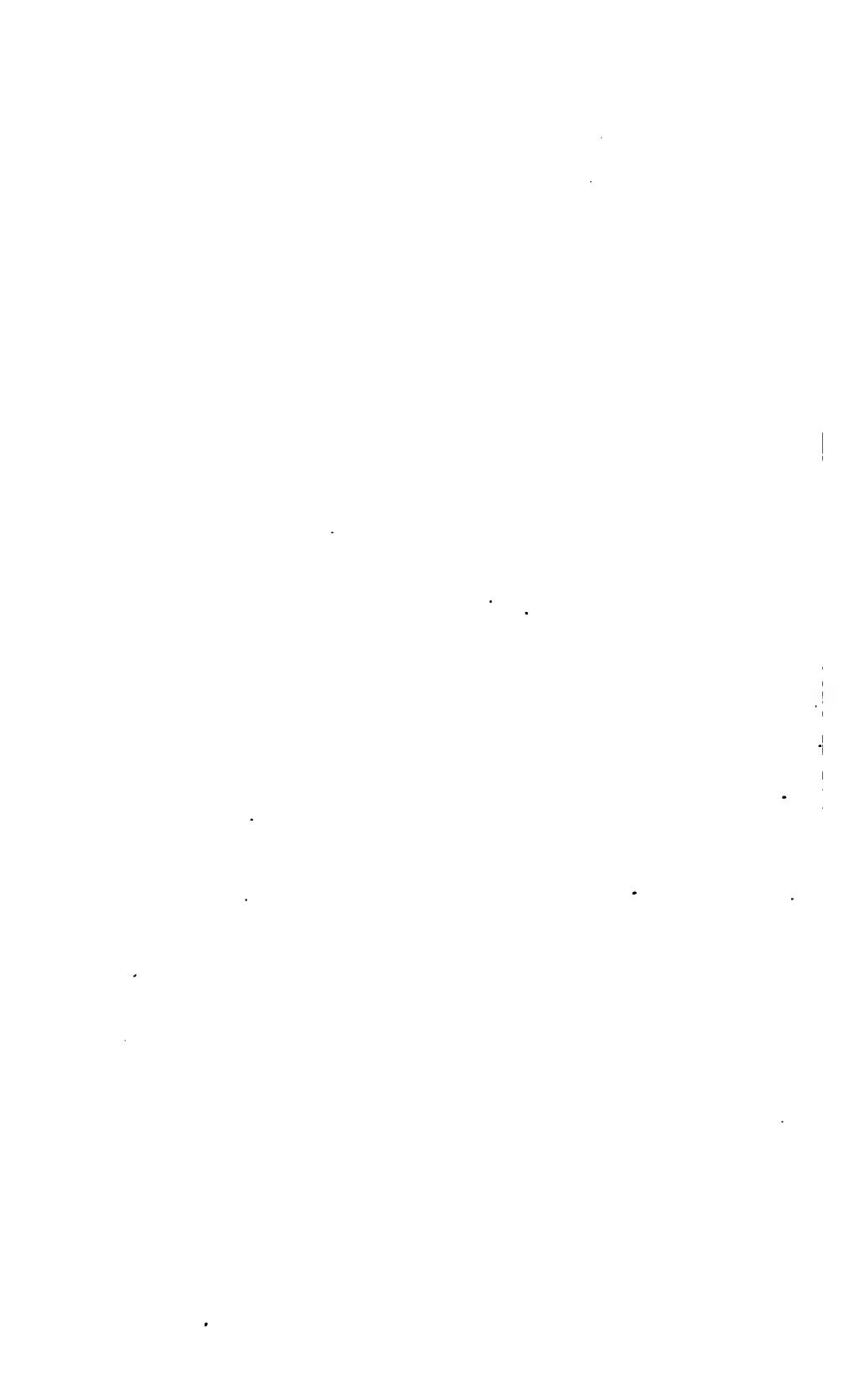
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OPINIONS
OR
HON. AUGUSTUS H. GARLAND, OF ARKANSAS.
APPOINTED MARCH 6, 1885.

ACCRUED PENSIONS.

The terms "accrued pensions," as used in section 4718, Revised Statutes, mean the amount of money *unpaid* by the Government to which a pensioner, or a person who had a valid claim for pension pending, was entitled at the time of his death.

The receipt by a pensioner of a check for the amount due him on his pension, which was indorsed but not transferred by him in his life-time, is not *payment*. The amount so due is accordingly "accrued pension," and is payable to those only who are entitled thereto under such section.

DEPARTMENT OF JUSTICE,
April 16, 1887.

SIR: By your letter of the 12th of April, 1887, you request my opinion "upon the question as to when, under the provisions of section 4718, Revised Statutes, payment of pension to a pensioner is so completed that the amount due by way of pension becomes assets and ceases to be accrued pension."

The question with reference to the usual mode of paying pensions is more fully stated in the communication of the Commissioner of Pensions in his letter to you of the 11th of April, 1887, transmitted with yours, as follows: "Whether or not, under the provisions of section 4718 of the Revised Statutes of the United States, where a check has been transmitted by a pension agent through the mails to a pensioner and received by him, and thereafter, whether the pensioner dies having indorsed and not negotiated the check, or dies without having indorsed the check but having the same in his possession, payment is so completed, and title to the amount called for by the check so vested in the pensioner, that the

Accrued Pensions.

check can properly be considered part of the assets of the decedent, and as such assets collected by his legal representatives and the proceeds be subject to the payment of the debts of the deceased."

The phrase "accrued pension," as used in this section, means the amount of money unpaid by the Government to which a pensioner, or one who had a valid pending claim for pension, would be entitled at the time of his death. The statute declares, first, this unpaid money shall be paid to the widow of the pensioner if he leaves one; second, if there be no widow, it shall be paid to his child or children under sixteen years of age; if he leave no widow or child or children under sixteen years of age it shall not be paid at all, "except so much as may be necessary to reimburse the person who bore the expenses of the last sickness or burial of the decedent, in case where he did not leave sufficient assets to meet such expenses." That the "accrued pension" shall be paid to no other than as above stated is strongly emphasized by the provision that "such accrued pension shall not be considered a part of the assets of the estate of the deceased nor liable to be applied to the debt of such estate in any case whatever, but shall inure to the sole and exclusive benefit of the widow or children; and if no widow or child survive, no payment whatsoever of the accrued pension shall be made or allowed." This clause imposes upon the officers of the Government the obligation to neither make nor allow to be made any payment of the "accrued pension" to the executors or administrators of the decedent for the general payment of debts or distribution, with the possible single exception that if they have borne the necessary expenses of his last sickness and burial and he shall have died without sufficient funds to re-imburse them, so much of the accrued pension may be paid them as they shall have paid for those purposes. In no event can they receive any part of the "accrued pension" merely as the legal representatives of the decedent.

Unless, then, the pension was paid to the decedent in his life-time and became a part of his general assets, it can not pass to his legal representatives so as to be subjected to the payment of the debts of the decedent. The question is thus reduced to, what is a payment to a pensioner in his life-time?

Accrued Pensions.

In the absence of special contract the presumption is that the payment of an obligation shall be made in money. This presumption applies to a pensioner as well as to any one else. Till he gets his money or that which in law is its equivalent, he is not paid nor is the Government discharged. If he receives a check but never transfers it nor gets the check cashed he has not received his money; for a "banker's check is not money" (*Chitty on Bills*, 399). If he receives a check and payment is refused he has no right of action against the bank. "The holder of a bank check can not sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer."

The fact that the check was properly drawn on a national bank (a public depository) by an officer of the Government in payment of a public creditor does not alter this general rule, (*Bank of Republic v. Millard*, 10 Wall., 152). "The payee of a check before it is accepted by the drawee can not maintain an action upon it against the latter, as there is no privity of contract between them." So held, where a check of the Treasurer of the United States upon a national bank duly designated as a depository of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit to recover the amount of the check was brought by its true owner against the bank (*First National Bank v. Whitman*, 94 U. S., 343). A check, then, until presented, accepted, or marked good by the drawee, is only a personal obligation of the drawer. "When the United States by its unauthorized officer become a party to negotiable paper they have all the rights and incur all the responsibility of individuals who are parties to such instruments. We know of no difference except that the United States can not be sued." (*United States v. Bank of Metropolis*, 15 Peters, 392; and *United States v. State Bank*, 96 U. S., 30.)

The United States, then, stands upon the same plane as others who issue negotiable paper, except that the United States can not be sued. The general rule is, if a debtor give his creditor his own promissory note or obligation of no higher order than the original debt, the debt is not thereby paid nor the debtor discharged (*Peter v. Beverly*, 10 Peters, 567; *James v. Hackly*, 16 Johns, 277). It is stated by Kent,

Accrued Pensions.

Chief-Justice, in the *People v. Howell* (4 Johns, 304), "unless a check is paid it is no payment."

In the case of *Burnet v. Smith* (10 Foster, 264), it is ruled: "Until cashed, it (a check) is no payment of a pre-existing debt any more than a promissory note is payment of such debt without an agreement to receive it as such."

This principle is sustained by abundant authorities, and except in Maine and Massachusetts is the generally accepted rule both in the United States and England. A single expression occurs in the opinion of the court in the case of *Downey v. Hicks* (14 How., 240), which would seem to be inconsistent with the rule above stated, as follows: "In ordinary transactions a check on a specie-paying bank on demand is payment. And if the holder of the check present it to the bank and direct the amount to be placed to his credit as a deposit, and the bank should fail, the loss would be the depositor's." A careful examination of this case will show that the first clause of this quotation must be read in connection with the last, to properly interpret the principle of the decision, and as a whole no more is to be derived from it than that a check presented and passed to the credit of a payee is a payment.

It is therefore concluded that the receipt of a check by a pensioner, which he has only indorsed but which has not been transferred by him in his life-time, is not a payment but is only one step in the process of payment. The amount yet remains as "accrued pension" and only payable accordingly to those entitled thereto. The indorsement alone by the decedent does not constitute a transfer. An indorsement and delivery are both essential; for until delivery in pursuance of indorsement, the indorser still retains the power to cancel the indorsement and personally present for payment, or at his option, if guilty of no laches, return to the drawer, or until presented to the drawer may countermand payment. Nor can the executors or administrators of the payee, by mere delivery without their own indorsement, consummate the transfer (Parsons on Notes and Bills, 159 and Note X). If known by them to be "accrued pension," they can not, by their own indorsement and delivery after the death of the pensioner, lawfully transfer the check, for by the provisions of the statute the "ac-

Remission of Forfeiture.

erued pension" is not the assets of the decedent and does not pass to them. The law clearly contemplates that the widow and children, as provided by the statute, shall be the beneficiaries and not the general creditors of the pensioner, and unless the payment has been legally received by the pensioner, it is incumbent on those intrusted with the administration of the law neither to make nor allow payment to be made to any other person. In reply to your inquiry, the sending of a check to a pensioner, which has been indorsed by him but not transferred in his life-time, is not a payment "so completed that the amount due by way of pension becomes assets and ceases to be accrued pension."

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

REMISSION OF FORFEITURE.

Opinion of March 19, 1887 (10 Opin., 584), namely, that the Secretary of the Treasury has no power to remit the forfeiture of a vessel condemned for being engaged in unlawfully killing fur seals (the case not arising in either of the islands St. Paul and St. George), re-affirmed.

DEPARTMENT OF JUSTICE,

April 16, 1887.

SIR: At your request I have reviewed my opinion in the case of the schooner *San Diego* in the light of the brief submitted by the claimants.

I am still of opinion that you have no power to remit the forfeiture of the schooner, which was condemned for the offense of being engaged in unlawfully killing fur seals.

Inasmuch as the law under which the forfeiture was incurred is not a law "*for laying, levying, or collecting any duties or taxes,*" or a law "*concerning the registering and recording of ships or vessels,*" or a law "*concerning the enrolling and licensing ships or vessels employed in the coasting trade or fisheries and for regulating the same,*" it seems to me very plain that the power of remitting forfeitures under the act of the 3d of March, 1797 (1 Stat., 506), is not given you in this case by that act, nor is it given you by section 5293, Revised Statutes,

Remission of Forfeiture.

which confines your power of remission to cases arising "under any provisions of law relating to fur seals upon the islands of St. Paul and St. George," and consequently does not embrace this case, which arose in neither of said islands.

In my opinion the law restricting your power of remission to these two islands is a legislative declaration that the laws relating to fur seals do not belong to the class of laws to which the act of 3d of March, 1797, applies, and that the power of remission under those laws must be confined to the islands named, in which places alone the killing of fur seals in Alaska was made lawful under certain express conditions, and consequently, *in which places alone*, in that Territory, violations of the laws for protecting fur seals were likely to occur under circumstances calling for a power to dispense with the penalties of the law.

It is thus not by the capricious or arbitrary exercise of power, but in accordance with a reasonable and proper intention, that the power of remission has been confined to cases occurring in the above-named islands by the law authorizing the killing of fur seals there.

The case in 6 Opinions, 488, which arose under laws for the regulation of passenger vessels, lends no support to the argument presented in the claimant's brief, because those laws came within the terms of the first section of the act of the 3d March, 1797, which expressly extends the power of remission to penalties and forfeitures incurred under laws regulating ships or vessels, and because the law of 1847, one of the laws involved, expressly said that forfeitures declared by it "*should be prosecuted as forfeitures are under the act to regulate duties on imports or tonnage*" (p. 490), which was taken to mean that the two acts should be on precisely the same footing as to forfeitures and their incidents.

It is not necessary to consider whether the power of remission given by the seventh section of the act of 1st of July, 1870 (16 Stat., 182), in cases arising in the waters *adjacent to* the islands of St. George and St. Paul, is still in force, notwithstanding the silence of section 5293, Revised Statutes, in that particular, because it does not appear that the offense for which the forfeiture was declared was committed in waters *adjacent to* either of those islands, unless we adopt

Attorney-General.

the interpretation of the claimants and abandon the ordinary sense of the adjective adjacent and make it synonymous with *waters of Alaska*, thus ignoring the settled rule of interpretation that words must be taken in their usual sense unless it is manifest that another sense was intended.

I beg to add that, owing to the desire of the claimants to be heard and the failure of their counsel to reach here in time to get a hearing before my opinion was given, I have thought proper to depart from the practice in such cases of merely stating my adherence to the opinion given, and to consider the subject with reference to what has been advanced by way of answer to the positions taken in the opinion.

Very respectfully, your obedient servant,
A. H. GARLAND.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

Where the question submitted by the head of a Department relates to duties of Territorial officers in a matter touching which such Department has no administrative concern, it is not deemed proper for the Attorney-General to give an official opinion thereon.

DEPARTMENT OF JUSTICE,
April 19, 1887.

SIR: By your letter of the 15th of April, 1887, you request my official opinion "relative to the qualifications of electors in Utah Territory, as prescribed by circular of information to registration officers, issued by the Commission, March 19, 1887."

No facts are stated to indicate that any question is pending in the Department of the Interior, nor any duty to be performed by the Department, to the proper discharge of which the solution of any question of law is a prerequisite. From all that appears in your letter, with its accompanying transmittals, the question of registration of voters in Utah can not by appeal ever come before you for determination, nor is the question one in which you have any official concern. Therefore, while I will ever take pleasure in affording

Nolan Land-Claim in New Mexico.

any assistance in my power to aid you in solving any questions of law which may arise in the discharge of your duties, I am limited by law to replying to legal questions arising in the administration of a Department, and, as is well stated by Attorney-General Bates, in 10 Opinions, 220, "when the solution of the question is not necessary to the discharge of any duty properly belonging to the Department it is not the duty of the Attorney-General to give an opinion thereon, and such opinion would consequently be extra-official and unauthorized." As, then, the question submitted appears to be one applicable only to duties pertaining to officers of the Territory over whose action in the matter referred to you have no official control, it would be improper for me to give an official opinion upon it. If, however, you do not concur in this view I will cheerfully reconsider it if a fuller statement of facts or reasons which you may see fit to suggest renders it proper to do so.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

NOLAN LAND-CLAIM IN NEW MEXICO.

Sembles that as to the Nolan claim to certain land in New Mexico, known as claim No. 39, there has not as yet been any "final action by Congress," as contemplated in the eighth section of the act of July 22, 1854, chapter 103.

The proviso in the fourth section of the act of July 1, 1870, chapter 202, confirming the Nolan grant, No. 48, does not include the above-mentioned claim, No. 39.

DEPARTMENT OF JUSTICE,

April 23, 1887.

SIR: I have duly considered the question presented in the accompanying papers, which were transmitted to me by you some months ago, touching the Nolan claim to certain land in New Mexico, known as claim No. 39, and in compliance with your request I now have the honor to submit my opinion thereon.

By the eighth section of the act of July 22, 1854, chapter 103, it was made the duty of the surveyor-general of New

Nolan Land-Claim in New Mexico.

Mexico, under instructions of the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and for this purpose he was thereby authorized to issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He was by the same section required to make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and that report, which was to be made in accordance with such form as the Secretary of the Interior might prescribe, was required to be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm bona fide grants and give full effect to the treaty of 1848 between the United States and Mexico. And the same section declared that, "*until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government,*" etc.

On the 27th of February, 1860, a claim in behalf of the widow and heirs-at-law of Gervacio Nolan was filed in the office of the surveyor-general of the Territory of New Mexico covering a tract of land situated in that Territory, alleged to have been granted by the Mexican authorities to the said Nolan and two others (Aragon and Lucero) his associates, in the year 1845. Claimants alleged that said Nolan died intestate some two years before filing their claims, and that previous to his decease he had purchased all the interest of his two associates in the premises. This claim was subsequently investigated and passed upon by the surveyor-general, who approved the same and transmitted his report and decision thereon (dated July 10, 1860), together with copies of the documents filed in the case, to the General Land Office, and in January, 1861, these were laid before Congress by the Secretary of the Interior. (See Ex. Doc. No. 28, House of Representatives, Thirty-sixth Congress, second session.)

Afterwards, in the same year (1860), another claim in behalf of the widow and heirs-at-law of said Nolan was filed in

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the office of the surveyor-general of the Territory of New Mexico. This claim embraced a large tract of land, different from the one above mentioned, which was then within that Territory, but is now in Colorado, and which was alleged to have been granted by the Mexican authorities to said Nolan alone in the year 1843. It was investigated by the surveyor-general, and a report and decision thereon (dated October 8, 1861) were made by him, affirming its validity and recommending its confirmation by Congress. These, with copies of the papers filed in the case, etc., were forwarded to the General Land Office, and in May, 1862, the Secretary of the Interior laid the same before Congress. (Ex. Doc. No. 112, House of Representatives, Thirty-seventh Congress, second session.)

The latter claim was numbered 48. The former, though numbered 9 in Ex. Doc. No. 28, cited above, is elsewhere designated and is now known as claim No. 39.

By a resolution of the House of Representatives, adopted February 10, 1868, at second session of the Fortieth Congress, both of these claims, along with several others that had previously been reported upon by the surveyor-general of New Mexico and laid before Congress, were referred to the Committee on Private Land Claims, with direction to report by bill or otherwise. On July 1, 1868, the committee submitted a report to the House, recommending that certain of the claims be confirmed, but for reasons therein stated the two Nolan claims, numbered 39 and 48, were "withheld for further investigation." (Report No. 71, House Reports of Committees, Fortieth Congress, second session.)

In regard to claim No. 39, no report thereon has since been made by that committee to the House, nor has any action whatever affecting the same since been taken by Congress, unless such action appears in what follows.

During the first session of the Forty-first Congress, namely, on March 29, 1869, a bill (H. R. No. 314) was introduced in the House to confirm the title of the heirs of Gervacio Nolan to certain lands in the Territory of Colorado, and was thereupon referred to the Committee on Private Land Claims. This bill embraced only lands which were covered by *claim No. 48*. It was reported back by the committee, with amend-

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ments, on April 23, 1870, during the second session of the same Congress, accompanied by an elaborate report recommending the confirmation of that claim to the extent of 11 square leagues, and was then discussed but not put on its passage. (See Congressional Globe, vol. 91, pp. 2932 *et seq.*) Neither in that report nor in the discussion on the bill is any reference made to claim No. 39.

A few days later, on the 26th of April, 1870, a bill in terms the same precisely as the one before the House, just adverted to, was introduced in the Senate (S. No. 843) and referred to the Committee on Private Land Claims. Shortly afterward it was reported back without amendment, the Senate Committee, in so doing, accompanying the same with the report that had been made by the House Committee as above, which was adopted by the former committee. The bill was passed by the Senate as reported, June 14, 1870 (see Congressional Globe, vol. 92, p. 4415). It also passed the House, without amendment, June 29, 1870, and became a law. In the proceedings which took place on the bill in either body, claim No. 39 is not mentioned. The law thus enacted is the act of July 1, 1870, chapter 202, entitled "An act to confirm the title of the heirs of Gervacio Nolan, deceased, to certain lands in the Territory of Colorado."

By the first section of this act the grant to the said Nolan, designated as number 48, is confirmed to the extent of 11 square leagues. The second and third sections provide for adjusting the exterior lines of the 11 leagues so confirmed, and the claims of actual settlers falling within the limits thereof, etc., also for running the public surveys within the grant, etc. The fourth section is as follows: "That upon the adjustment of said claim of the heirs of Gervacio Nolan, according to the provisions of this act, it shall be the duty of the surveyor-general of the district to furnish properly approved plats to said claimants or their legal representatives, which shall be evidence of title, the same to be done according to such instructions as may be given by the Commissioner of the General Land Office: *Provided, however,* That when said lands are so confirmed, surveyed, and patented, they shall be held and taken to be in full satisfaction of all further claims or demands against the United States."

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The question to which reference is hereinbefore made is this: Whether the proviso in the last-named section should be construed to include claim number 39 aforesaid. On its determination depends the point whether a restoration of the lands embraced in that claim to settlement and entry under the general land laws is warranted. If the claim is within the proviso, then it may well be deemed that the "final action of Congress, within the meaning of the act of 1854, has already been had thereon, and that the provision of the same act, requiring the reservation of lands covered by such claims, no longer applies thereto. On the other hand, if the claim is not within the proviso, the provision of the act of 1854, just mentioned, still remains applicable to it, and the requirement thereof ought not to be disregarded.

The language employed in the proviso, taken literally, is broad enough to include all manner of claims against the United States. But it was manifestly not intended to be so understood. It must be viewed as used with respect to the particular subject with which Congress was dealing, and is accordingly to be understood in a less general sense.

There is nothing in the act of 1870 itself, nor in the proceedings that preceded its enactment, which indicates that, in passing it, any other matter was considered and acted upon by Congress than claim number 48, and the claims of actual settlers within the limits thereof. That claim, as stated in the report to the House, made at the second session of the Forty-first Congress, embraced about 1,000,000 acres, and it is confirmed for less than 50,000 acres. The proviso would undoubtedly operate upon claims or demands upon the Government relating to the unconfirmed portion of said claim, if any such were made. But can it fairly be regarded as extending to claim number 39—notwithstanding the absence of any reference thereto in the act or in the above-mentioned proceedings? While the latter circumstance in some degree favors the negative of this question, there are other circumstances which, to my mind, bear even more strongly in the same direction.

Claim number 39, as regards Nolan, is partly original and partly derivative. It rests upon an alleged grant to him and two other persons, Aragon and Lucero, whose interests in

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the premises he is said to have acquired by purchase. The grant, when made, may have been invalid as to him (in view of his previous grant) under the Mexican colonization laws, but valid (at least for not exceeding 11 square leagues each) as to the other grantees; in which case a claim *under them* would be good, whether made by Nolan or any one else. Such claim might be prosecuted for confirmation in the names of the original grantees (*United States v. Sutter*, 21 How., 170), as it is only their title, or rather the original grant, with which Congress is concerned. Thus claim number 39 is, in the eye of Congress, not a claim of Nolan simply, but one of Nolan, Aragon, and Lucero, and viewed in that light it seems hardly reasonable to infer, from the mere generality of terms used in a statutory provision having sole reference to a claim of the former description, embracing the right or title of a single individual, an intention on the part of Congress that such provision should also apply to a claim of the latter character, comprising rights or titles of different individuals.

A proviso similar in terms to that contained in the act of 1870 is found in section 3 of the act of March 3, 1869, chapter 152, entitled, "An act to confirm certain private land claims in the Territory of New Mexico." In this act it is declared that the confirmation thereby made "shall only be construed as a quit-claim or relinquishment of all title or claim on the part of the United States to any of the lands not improved by or on behalf of the United States, and not including any military or other reservation embraced in either of said claims," etc. Here the claims designated in the act were confirmed for the entire area of each, excepting lands within the limits thereof which were improved as aforesaid, or included in any military or other reservation, and the sole object of the proviso would seem to be to cut off any additional claims that might be made for the lands so excepted. The proviso in the act of 1870 was doubtless copied from the one in the act of 1869, and was probably designed only to effect a like object with the latter, namely to bar all further claims in respect of the unconfirmed portion of the particular grant mentioned in the statute, *i. e.*, number 48.

The foregoing considerations lead me to the conclusion that the proviso in the act of 1870, which is the one in question,

Allotments of Land to Indians.

should not be construed to include claim number 39, and that as to this claim there has not as yet been any "final action of Congress."

I am, sir, very respectfully, your obedient servant,
A. H. GARLAND.

The PRESIDENT.

ALLOTMENTS OF LAND TO INDIANS.

The allotments of land to Indians provided for by the act of February 8, 1887, chapter 119, should, under the requirements of the third section of that act, be made jointly by an agent specially appointed for that purpose and the agent in charge of the reservation.

DEPARTMENT OF JUSTICE,
May 4, 1887.

SIR: Your letter of the 16th of April, 1887, addressed to me, states:

"In the preliminary steps taken by this Department for the execution of the law of the 8th of February, 1887, for allotments of lands to Indians, the question has arisen whether the law requires that allotments to Indians on each reservation shall be made jointly by a special agent and the agent in charge, or whether the agent in charge of each reservation shall be required to make the allotments on the reservation or reservations under his charge; or whether the work of making the allotments may be performed by the agents in charge of reservations or by special agents appointed for that purpose, as in the judgment of the Executive the best interests of the service may require."

The law to which you refer is an act for the partition of lands held by the Indian tribes among the individual Indians to be held in severalty. The first section provides for the survey and the amount to be set apart to each. The second section describes how and by whom the selections of lands shall be made. The third how and by whom the lands after selection shall be allotted and certified.

The object of the act is far-reaching and important. The duties to be performed in the allotments in many instances may be difficult and delicate, requiring a high order of dis-

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cretion and intelligence. The third section, which provides for the allotment, is "That the allotments provided for in this act shall be made by special agents appointed by the President *for such purpose*, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office."

The language, "the allotments * * * shall be made by special agents appointed by the President *for such purpose*, and the agents in charge of the respective reservations," is in the conjunctive. That the special agents shall be appointed for that purpose implies that in the allotment the agent in charge of the reservation whose appointment was not made with reference to special qualifications for this new and responsible duty should be joined in its discharge by another, in whose appointment the very work to be performed would be had in view by the President, and the selection of the appointee made with express reference to his qualification for that work. The distinction between the selection of the land provided for in section 2, which may be made by one agent, and the allotment provided for in section 3, which requires two, is recognized in the latter part of the proviso to section 2, which clearly indicates that they are different and successive steps in the proceedings for partition.

In reply to your inquiry it is therefore concluded the act requires the allotment should be made jointly by an agent specially appointed for that purpose and the agent in charge of the reservation.

I am, sir, yours, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

Foreign Consul.—Designs for Coins.

FOREIGN CONSUL.

A foreign consul, resident in the United States, must look for protection in his person and property to the laws of the State in which he resides.

DEPARTMENT OF JUSTICE,

May 5, 1887.

SIR: In reply to your communication of the 21st of April, 1887, calling my attention to certain complaints of the Imperial German consul at Cincinnati, Ohio, I beg to say that as the case does not come within section 4062, Revised Statutes of the United States, the consul must look for protection to the laws that protect the rights of the community in which he resides. The laws that protect the President of the United States in his person and property are the same as those that protect the humblest citizen, and if the personal or property rights of that high functionary should ever be violated in the city of Cincinnati he would have to look for protection to the laws of the State of Ohio. Certainly a foreign consul can not justly complain that he is not better protected than the highest officer of the Government of the United States.

It results, then, that the case presented is not one in which I can give Assistant United States Attorney Bruce any instructions.

Very respectfully, yours,

A. H. GARLAND.

The SECRETARY OF STATE.

DESIGNS FOR COINS.

The provisions of section 3510, Revised Statutes, do not authorize the Director of the Mint, with the approval of the Secretary of the Treasury, to accept and pay for new designs for existing coins. His authority thereunder, as regards the preparation of original dies, is limited to those intended for new coins.

DEPARTMENT OF JUSTICE,

May 6, 1887.

SIR: By your letter of the 20th of April you inquire: "Has the Director of the Mint, with the approval of the Sec-

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retary of the Treasury, authority under section 3510 of the Revised Statutes to accept and pay for new designs for existing coins to be submitted by artists as contemplated in enclosed circular, or only designs for new coins?"

Section 3510 provides: "The engravers shall prepare from the original dies *already authorized* all the working-dies required for use in the coinage of the several mints, and, when new coins or devices are authorized, shall, if required by the Director of the Mint, prepare the devices, models, molds, and matrices, or original dies for the same, but the Director of the Mint shall nevertheless have power, with the approval of the Secretary of the Treasury, to engage temporarily for this purpose the services of one or more artists, distinguished in their respective departments of art, who shall be paid for such service from the contingent appropriation for the mint at Philadelphia."

This is a re-enactment of the eighth section of the "Coinage Act of 1873." By it two classes of dies are provided for—the original dies and the working dies; also two classes of coins—those already in circulation and new coins. With reference to the coins already in circulation, the section assumes the original dies have been authorized, as they were by the act of 1873 and prior coinage acts. It requires the engraver to prepare from the original dies *already authorized* the working dies for the old coins. He is not empowered to change. The limitation of his power to the preparation of working dies is equivalent to a denial of his power to prepare original dies, unless further authority be granted by Congress. This view is supported by the fact that as to new coins he is expressly empowered to prepare new dies. The intent of the act is doubtless to give stability to the coinage, to avoid the changes to which it might be subjected if the power to change the die was left to be exercised as often as the taste or judgment of those in charge of the mint might change. The use of the coin is intended to be world-wide, as a medium of exchange, a measure of value, a standard of value, and a store of value. That the whole world should know the coin, its nativity, and value upon sight is commercially important. Frequent changes in the design or device upon the coin would greatly impair its usefulness. If a change became necessary

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or proper in consequence of the advance of science or taste, Congress determined to hold in its own hands the power to determine when the emergency for a change shall have arisen. The section therefore only authorizes the preparation of working dies by the engraver for existing coins which are now in circulation, and the clause as to the preparation of original dies by him is limited to new coins.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

The proviso in section 7 of the act of March 3, 1883, chapter 121, subjecting to a duty of "100 per centum ad valorem upon the actual value of the same," coverings of imported merchandise designed for use otherwise than in the bona fide transportation of such merchandise to the United States, etc., applies to free as well as to dutiable importations.

DEPARTMENT OF JUSTICE,

May 9, 1887.

SIR: Your letter of the 26th of April, 1887, contains the following submission:

"Referring to opinions received from your Department, under date of September 17 and 27, and December 1, last, relative to the dutiable character of coverings for imported merchandise, I have the honor to request a further expression of your views, as to whether the provisions of the law therein considered (section 7, March 3, 1883) apply to such coverings of imported free goods as are other than the usual and necessary coverings for the transportation of such goods, and which might, if containing dutiable merchandise, be liable to duty under the proviso in said section at the rate of 100 per centum ad valorem."

Section 7 of the act of 1883 is: "That sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States and section fourteen of the act entitled 'An act to amend the customs revenue laws, and to repeal moities,' approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby,

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repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering, of any kind, be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

This section is a part of the tariff act of that date. The act is a general modification of the tariff laws. It includes in its provisions merchandise both dutiable and free. That part of section 7 which precedes the proviso repeals the laws imposing and regulating the addition of the value of the coverings as a part of the dutiable value of merchandise on which by law duties were imposed. The subject of the enactment in the seventh section, taken alone, does not relate to the free list. The question to be solved is, shall the proviso receive a restricted interpretation, limiting it to the seventh section alone, or an enlarged construction, embracing the whole subject of coverings of merchandise referred to in the act. The language of the proviso if taken as a guide certainly included both dutiable and free goods. The proviso is, "That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

To limit its language to dutiable goods to the exclusion of free, it is necessary to interpolate in it after the word "coverings" the words "of dutiable goods," so that it would read "that if any packages, sacks, crates, boxes or coverings of *dutiable goods* of any kind," etc. The only fact to warrant such interpolation is that the preceding part of the section refers to such goods, but this fact is met by the fact that the

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law as a whole includes both dutiable and free goods. The doctrine that all the parts of an enactment must be considered in interpreting any clause therein, is especially applicable to tariff legislation; for as it usually treats of many different subjects, a special qualification which should apply to each is seldom attached to each, but all, falling within the same reason, are generally intended to be covered by a single qualification. The reason for the proviso under consideration, which imposed an unusually high duty upon goods which are imported as coverings to evade the revenue, or for other purposes than as coverings, applies with equal force to free as to dutiable goods. This high tax was intended to discourage the use, as coverings, of goods intended for other uses. The recognition of this intent would be more important as to free than dutiable goods; for as duties are not to be collected on the former, the processes of appraisement, which in many instances are the means by which fraud or evasion are detected, are largely inapplicable to free goods. The seventh section relieves from duty all coverings not within the proviso and places them on the free list. The proviso is intended to place a duty on goods which, by their use as coverings, are very liable to be by evasion wrongfully introduced free, and which should be taxed.

The language of the law, the reason, and the probable intent, concur in embracing the free and the dutiable goods alike in the provisions of the proviso, and it should be so administered.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

HOSPITAL POINT LIGHT STATION.

The grant to the Government of the site of the Hospital Point Light Station in Massachusetts, which is bounded by a line running to the shore and thence *by the shore*, etc., does not include the shore.

DEPARTMENT OF JUSTICE,
May 13, 1887.

SIR: Your letter of the 5th ultimo, inclosing a letter of the Light-House Board, and other papers relating to the site of

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the Hospital Point Light Station in Massachusetts, presented for my consideration the question "as to the rights of the United States to a rocky margin between high and low water mark adjoining the said site."

The premises thus described appear to include only the *sea-shore* which forms the easterly and southerly boundary of the site in question.

Under the law of Massachusetts the owner of land bordering on the sea holds to low-water mark, but not extending to more than 100 rods below high-water mark (*Storer v. Freeman*, 6 Mass., 435). He may alienate upland without the shore, or the latter without the former. (*Ibid*, 439; see also *Mayhew v. Norton*, 17 Pick., 360; *Drake v. Curtis*, 1 Cush., 413). The shore does not pass as appurtenant to the upland. (*Commonwealth v. Alyer*, 7 Cush., 80).

In the present case, as it seems, the grantor of the light-house site owned both the upland and the shore, and in the deed to the Government the premises thereby conveyed are thus described: "Beginning at a stone post fixed in the ground, etc., and running thence 85 degrees east, * * * to the shore, thence *by the shore* in a southerly and westerly direction to meet a line running from said post south 18 $\frac{3}{4}$ degrees west * * * to the shore, thence by said last-mentioned line to said post."

It was held in the case of *Storer v. Freeman*, above cited, that a grant of land bounded by a line running to the shore, and thence *by the shore* to other land, did not include the shore.

I deduce from the foregoing this result: that under the deed granting the light-house site to the Government it derived no title whatever to the sea-shore bordering on the site, but that the title thereto remained in the grantor. Such title, however, is subject to the general right of the public for the ordinary purposes of navigation until the flats are built upon or inclosed. (*City of Boston v. LeCraw*, 17 How., 426.)

Had the site been bounded in the deed *on or by the sea* instead of *by the shore*, the result would have been different. This would carry the grant to low water, and include the shore.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

Claim of S. B. Peterson.

CLAIM OF S. B. PETERSON.

The crew of an American vessel, wrecked on the South Pacific Ocean, were supplied with necessary clothing by a United States consul, who, on learning that wages were due them, applied to the master of the vessel to pay for the clothing out of the wages due, which the latter did. On their arrival in the United States the crew brought suit against the owners of the wrecked vessel for their wages, and recovered a judgment therefor: Advised, that such owners have no valid claim against the United States for the money paid by the master, as above; that their remedy, if any they have, is against the consul and the sureties on his bond.

DEPARTMENT OF JUSTICE,
May 14, 1887.

SIR: Your communication of the 21st April, 1887, requesting an opinion on the claim of S. B. Peterson, esq., asking to have refunded to him by the United States the sum of \$218.99, being the amount, including costs, decreed against the owners of the wrecked brig *Levi Stevens* by the United States district court for the district of California in a suit for wages brought against said owners by the crew of the said vessel, the ground of the claim being that nearly the whole of the amount of the wages recovered had, at the time of suit brought, been already paid by the master of the said vessel to the United States consul at Apia, and by him applied to what he claimed to be due for clothing furnished the crew of the wrecked vessel.

The *Levi Stevens* was wrecked in the South Pacific Ocean in November, 1885, on the Suwarrow Reef. The crew succeeded in landing on the island of Suwarrow, where they remained until the following March, when they took shipping for Apia, in the island of Samoa, where they arrived in the following month of April.

The United States consul at Apia, Mr. Greenbaum, attended to their wants, supplying them with the necessary clothing, amongst other things, and upon learning that wages were due them he applied to the master to pay for the clothing furnished out of the wages due. This the master did as to all of the crew except one, but without their assent, he borrowing the necessary money on the credit of the owners of the wrecked vessel.

It is found as a fact in the said case by the district court

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that the consul, when asked by the crew who was to pay for the clothing furnished, replied, "the United States;" and also that the consul, at the time he furnished the clothing, had no information that wages were due the crew.

It was urged by the owners of the wrecked vessel, in defense to the case made by the libellants, that the payment by the master in obedience to the consul's direction or demand was, to that extent, a lawful discharge of the amount claimed in the libel.

But the district court did not consider the defense of payment a valid one, and, proceeding on the ground that the case fell within section 4577, Revised Statutes, held that the crew were "destitute" in the sense of said section, and so entitled to have their necessities supplied and to be sent home at the expense of the United States, and decreed accordingly for the several amounts claimed.

It is upon this state of facts, presented considerably more in detail, that Mr. Peterson's claim rests.

In my opinion he has no valid demand against the United States for the money paid by the master of the unfortunate vessel to Consul Greenbaum.

Section 1697, Revised Statutes, provides that every consul shall, before receiving his commission, give a bond with such sureties as the Secretary of State shall approve "for the true and faithful accounting for, paying over, and delivering up of all fees, moneys, goods, effects, books, records, papers, and other property which shall come to his hands, or to the hands of any other person to his use as * * * consul

* * * under any law now or hereafter enacted; and for the true and faithful performance of all other duties now or hereafter lawfully imposed upon him as * * * consul * * *. And the bond so required "shall be deposited with the Treasury."

Section 1735, Revised Statutes, provides as follows: "Whenever any consular officer willfully neglects or omits to perform seasonably any duty imposed upon him by law, or by any order or instruction made or given in pursuance of law, or is guilty of any willful malfeasance or abuse of power, or of any corrupt conduct in his office, he shall be liable to all persons injured by any such neglect or omission, malfeasance, abuse,

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or corrupt conduct, for all damages occasioned thereby; and for all such damages he and his sureties upon his official bond shall be responsible thereon to the full amount of the penalty thereof, to be sued in the name of the United States for the use of the person injured. Such suit, however, shall in no case prejudice, but shall be held in entire subordination to the interests, claims, and demands of the United States, as against any officer under such bond, for every willful act of malfeasance or corrupt conduct in his office."

Section 1736, Revised Statutes, provides as follows: "If any consul or commercial agent neglects or omits to perform seasonably the duties imposed upon him by the laws regulating the shipment and discharge of seamen and the reclamation of deserters on board or from vessels in foreign ports, or is guilty of any malversation or abuse of power, he shall be liable to any injured person for all damage occasioned thereby; and for all malversation and corrupt conduct in office he shall be punishable by imprisonment for not more than one year and by a fine of not more than ten thousand dollars and not less than one thousand."

It thus appears that Congress has addressed itself with some care to the subject of providing security against the unfaithfulness of persons holding consular offices, and we are not at liberty to say that the provision thus made is not entirely adequate.

It can not be doubted that this legislation was the result of the well-settled principle that the United States is not liable to its citizens for the consequences of the wrongs or shortcomings of its officers. "No government," says Mr. Justice Miller in *Gibbons v. United States* (8 Wall., 269, 274), "has ever held itself liable to individuals for the malfeasance, laches, or unauthorized exercise of power by its officers and agents."—The same doctrine has been often laid down by the same court (*Minturn v. United States*, 106 U. S., 437; *United States v. Kirkpatrick*, 9 Wh., 720; *United States v. Van Zandt*, 11 Ib., 184; *Dox v. Postmaster-General*, 1 Pet., 318).

It is thus very clear that if the claimant, Peterson, has any remedy it is against the consul and the sureties on his bond, and not by any possibility against the United States.

This would seem to dispose of the case.

Steam Engineers in the District of Columbia.

It might be considered as hardly proper if I were to go further and indicate an opinion on the abstract question as to the meaning of the word "destitute" as used in section 4577, Revised Statutes, in view of the conflict in that particular between the Department of State and the United States district court for the district of California. The question is a judicial one, and should be settled, it would seem, by the courts. At the same time, if it were before me as a practical question, I should dispose of it as any other question.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

STEAM ENGINEERS IN THE DISTRICT OF COLUMBIA.

Section 7 of the act of February 28, 1887, chapter 272, withdraws from the operation of section 6 of that act *all* steam engineers holding Federal or State licenses.

DEPARTMENT OF JUSTICE,

May 17, 1887.

SIR : I have the honor to say, in reply to the question submitted in the letter of Mr. Commissioner W. B. Webb to you of 3d May, 1887, and by you referred to me, that in my opinion the seventh section of the act of 28th February, 1887, entitled "An act to regulate steam engineering in the District of Columbia," withdraws from the operation of the sixth section of the act all persons licensed as steam engineers by the United States or any State.

Congress appears to have proceeded on the idea that there is no necessity to apply the act to any person who has been declared by Federal or State authority competent to act as a steam-engineer. If a person is fit to run a marine engine, there would seem to be no ground to doubt his qualification to run a stationary engine.

This recognition of Federal and State licenses in the District of Columbia was, no doubt, intended to promote public convenience, but if, as intimated, some State authorities are not vigilant enough to prevent the licensing of unfit persons as steam engineers, that fact may be a proper ground for

Ownership of Real Estate by Aliens.

amending the law, but it can have no influence in its interpretation. The law must have effect according to the manifest sense of its words, which exempt from its operation *all* engineers holding Federal or State licenses.

I have the honor to be, sir, your obedient servant,
A. H. GARLAND.

The PRESIDENT.

OWNERSHIP OF REAL ESTATE BY ALIENS.

The provisions of the act of March 3, 1887, chapter 340, restricting the ownership of real estate in the Territories to American citizens, etc., apply to mines, these being real estate.

But stock in a corporation is personality, and consistently with those provisions an alien may hold shares of stock issued by an American corporation owning mineral lands in the Territories; yet where the holding by aliens exceeds 20 per cent. of its stock, such corporation can neither own nor hold hereafter acquired real estate while such holding by aliens in excess of 20 per cent. continues.

So an alien may hereafter advance money for the purpose of developing mining property in the Territories; but he can not thereby acquire any interest in such real estate.

An alien may lawfully contract with an American owner to work mines by a personal contract, contract for hire, or a bona fide lease for a reasonable time.

DEPARTMENT OF JUSTICE,
May 20, 1887.

SIR: A reply to your inquiries must be derived from an interpretation of the act of the 3d of March, 1887, entitled "An act to restrict the ownership of real estate in the Territories to American citizens, and so forth." The inquiries are,

First. Was the act intended to and does it apply to mines?

Second. Can aliens lawfully acquire, own, and hold shares of stock issued by an American corporation which is the owner of mineral lands in the Territories?

Third. Would the advancement of money by aliens for the purpose of developing mining properties be lawful under the act?

Fourth. Can aliens lawfully contract with American owners for working mines or making any proper use of mineral lands for a term of years?

The first section of the act forbids aliens, who have not de-

Ownership of Real Estate by Aliens.

clared their intention to become citizens of the United States, and alien corporations, "to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories of the United States or in the District of Columbia," except in the cases enumerated in the exception and proviso to the section.

The second section forbids the operating, holding, or owning of such real estate hereafter acquired, by any corporation or association in which more than 20 per cent. of the stock is or may be owned by persons, corporations, or associations not citizens of the United States.

The third section forbids corporations other than railway, canal, or turnpike companies, to hereafter acquire, hold, or own more than 5,000 acres of land hereafter acquired, and limits railway, canal, and turnpike companies in their acquisition to such lands as may be necessary to the proper operation of their roads, canals, and turnpikes.

The fourth section provides for forfeiture of the property for violations of the provisions of the act.

The property forbidden to be acquired, held, or owned in the first section is "real estate, or any interest therein." The term real estate is very comprehensive. It includes lands and every estate that may be inherited which is annexed to, arises out of, or is exercisable therein. This term embraces agricultural, mineral, desert, and timber lands, and town sites, alike. The phrase "any interest therein" is somewhat ambiguous. It might bear the construction that a lease for years is an interest in land; and land is real estate; therefore a lease for years is an interest in real estate.

It admits of another construction: that the words "any interest therein" must refer to an interest in real estate; that a lease for years, or any estate less than a freehold in land, is not real estate, but a chattel real, and is so known in the law; that the word "therein" refers to what in law is known as real estate, and as a lease for years is not so known it does not include a lease. In this view of the act the term would signify any proportionate part or interest in what is known in law as real property, which, as such, would pass at the death of the ancestor to the heir, and not to the administrator or executor.

Ownership of Real Estate by Aliens.

It was not the purpose of the law to change the whole policy of the Government to such an extent as to exclude emigration and forbid to an alien even a lawful temporary residence in the Territories of the Government and the District of Columbia. Yet the first construction suggested would effect that result. Under it the owner of property in the District of Columbia could not lawfully lease, even for a month, a dwelling to one not a citizen. The alien emigrant to the Territories who had hoped and intended, as a citizen in the future, to make his home there, could not lawfully obtain a building in which to shelter his family. Such considerations as these enforce the view that the latter construction is in accordance with the intent of the legislature, and that bona fide leases are not intended to come within the inhibition of the act. The exception to the first section relieves from its provisions such real estate or interest therein as may be acquired in the ordinary course of justice in the collection of debts contracted before the passage of the act, but those provisions attach with full force to debts contracted since its passage. The expression in the second section "no corporation * * * shall hereafter acquire or hold or own any real estate hereafter acquired" relates to all future operations of any corporation in real estate in the Territories or the District of Columbia. It does not divest any rights now existing, nor preclude American corporations from holding real estate now owned by them, even although more than 20 per cent. of their stock may be owned by other than citizens; but in case more than 20 per cent. of their stock now is, or at any future time should be, held and owned by others not citizens or American corporations, while such per cent. of stock is so held and owned no further acquisition can be made of real estate by any such corporation. The act does not deny the right of American owners to borrow money from aliens, nor to secure such loans on real estate, but in the event of a sale on a future loan the alien creditor could not at such sale become a purchaser.

I therefore reply to the inquiries submitted as follows:

First. As mines are real estate, or inheritable interests in real estate, the act does apply to them.

Second. As stock in a corporation is personality, an alien

Bridge Across the Missouri at Omaha.

can lawfully have, own, and hold shares of stock issued by an American corporation which is now the owner of mineral lands in Territories; but if the holding by aliens exceeds 20 per cent. such corporation can neither acquire, hold, nor own hereafter acquired real estate while more than 20 per cent. of stock is held and owned by aliens.

Third. Under the act, the advancement of money hereafter by aliens for the purpose of developing mining property is lawful, but no interest in the real estate can be acquired by such advancement, nor would an alien have the right to purchase the real estate, nor any interest therein, on a loan made since the passage of the act, even if sold on his own security or lien.

Fourth. Aliens may lawfully contract with American owners to work mines by personal contracts for hire, or by bona fide leases for a reasonable time.

I am, sir, with great respect,

A. H. GARLAND.

The PRESIDENT.

BRIDGE ACROSS THE MISSOURI AT OMAHA.

The plans for the bridge authorized by the act of March 3, 1887, chapter 356, to be built across the Missouri River between the cities of Omaha and Council Bluffs, should not be approved by the Secretary of War unless they provide for a structure of sufficient strength to bear trains of cars drawn by locomotives.

DEPARTMENT OF JUSTICE,

June 2, 1887.

SIR : An opinion is asked on the point whether the plans for the bridge authorized by the act approved March 3, 1887, entitled "An act authorizing the construction of a bridge across the Missouri River between the cities of Omaha, Nebr., and Council Bluffs, Iowa, and for other purposes," can be properly approved by the Secretary of War unless they provide for a structure of strength sufficient to bear trains of cars drawn by locomotives.

It seems clearly the intention of Congress that the bridge provided for shall be built in such a way as to accommodate all sorts of land-carriage and traffic; "a combined railway and

Accounts for Expenditures by the Post-Office Department.

wagon bridge for the safe and convenient passage of wagons, carriages, stock, steam, cable, and street cars, foot passengers, and all road travel."

It was the evident intention of Congress that the bridge should be maintained as much for the transit of railway trains as for any other kind of carriages or cars upon paying the lawful tolls.

To allow a bridge to be built not adapted for the use of railway companies entitled to use it would be to defeat the obvious intention of Congress.

Very respectfully yours,

A. H. GARLAND.

The SECRETARY OF WAR.

ACCOUNTS FOR EXPENDITURES BY THE POST-OFFICE DEPARTMENT.

The adjustment of accounts for expenditures of the Post Office Department under the legislative, executive, and judicial appropriation bill can be done by such accounting officers in the Treasury Department as the Secretary of the Treasury may assign to that duty. It is not required by statute to be performed by the Sixth Auditor.

DEPARTMENT OF JUSTICE,

June 6, 1887.

SIR: Your letter of the 1st instant inquires what officer of the Treasury Department is charged with the duty of adjusting the accounts for expenditures by the Post-Office Department under the legislative, executive, and judicial appropriation bill.

It suggests that there seems to be "doubt and uncertainty in the statutes," and that the adjustment of the accounts has been made by different Treasury officials.

By section 277, Revised Statutes, the Sixth Auditor "receives, audits, and settles all accounts arising in the Post-Office Department, or relative thereto." His duties are defined.

There are, however, "other duties in relation to the financial concerns of the Department" which may be assigned to him by the Secretary of the Treasury, but are not his official duties unless so assigned.

Accounts for Expenditures by the Post-Office Department.

The language of the statute limits his duties "to all accounts arising in the Post-Office Department, or relative thereto." Their enumeration is found in sections 277, 292, 293, 294, 295, and 296, Revised Statutes, and section 4, pages 154 and 224, of the Supplement to the Revised Statutes.

The fact that these duties are thus enumerated implies an exclusive enumeration, and the implication is fortified by the reference to "other financial concerns of the Department" that may be his duties also.

The duties enumerated are his official duties absolutely; the "other" duties are not his official duties absolutely. The meaning of the phrase, "accounts arising in the Post-Office Department, or relative thereto," is significant, considered apart from the context of the section. These accounts are of a fiduciary character, dependent upon the discretion of the Postmaster-General under authority of law, and generally refer to the postal service, and go direct to the Sixth Auditor.

The accounts of the disbursing clerk under the legislative, judicial, and executive bill are not included among the "accounts arising in the Post-Office Department," as enumerated, but are accounts arising directly under the appropriation bill mentioned, are of a determinate character, where the discretion of the Postmaster-General is not the controlling authority, except in certain contingent expenses common to all disbursing clerks of the executive departments. These accounts go to such accounting officers in the Treasury as the Secretary of the Treasury may direct.

Very respectfully,

A. H. GARLAND.

The POSTMASTER GENERAL.

Brig General Armstrong.

BRIG GENERAL ARMSTRONG.

Consideration of a claim presented by Mr. S. C. Reid, jr., on account of alleged advances made by him as agent and attorney for claimants, in the prosecution of the claim of the owners, officers, and crew of the brig *General Armstrong*.

DEPARTMENT OF JUSTICE,

June 9, 1887.

SIR: I have the honor to acknowledge the receipt of your communication of the 6th instant, in which you request an opinion from me "on a question of law which has been raised before the Department (of State) in relation to the distribution of the fund in the case of the brig *General Armstrong*, under the act of Congress approved April 20, 1882."

I understand that the question relates to the validity of a claim presented by Mr. S. C. Reid, jr., against the United States on account of certain advances made by him as agent and attorney for claimants in the prosecution of a claim of the "owners, captain, officers, and crew of the *General Armstrong*," but its precise scope I am not sure that I correctly apprehend. If, therefore, in the opinion that follows, I fail to pass upon the exact question you intended to bring to my attention, I hope you will make further and specific inquiry.

The liability of the United States under the act of April 20, 1882, is measured by the losses which the "captain, owners, officers, and crew" of the *General Armstrong* sustained through the destruction of that brig.

The liability is to such "owners, captain, officers, and crew," their legal representatives or assigns, and if any part of the fund now under your control is paid to Mr. Reed it must be paid to him for and on account of those to whom it has been adjudged.

In order to warrant such payment to him his authority to receive their money must be established.

The authority claimed by virtue of the documents forwarded as exhibits Nos. 2, 3, 4, and 5, with your communication, has been negatived in a well-considered opinion of my predecessor, Mr. Brewster, which has been acted on by the the Department of State, and in which I concur. His claim upon the fund by reason of services rendered in the capacity

Brig General Armstrong.

of agent or attorney for the "owners, captain, officers, and crew" in creating it were considered, adjudicated, and liquidated by your predecessor, Mr. Frelinghuysen.

The amount of money expended by the agent in the service of his principals was as much an element to be considered in fixing his compensation as the time and skill given to their cause.

It is therefore probable that the compensation allowed Mr. Reid was intended to cover money expended, as well as personal service rendered.

If this is untrue in fact, and if a proper showing for reopening the question could have been made at the proper time, the decision of your predecessor might have been reviewed. Upon such review, if the authority of the Secretary of State to adjudicate the rights of the agent of the "owners, captain, officers, and crew" against them and their funds in his hands, as held by Mr. Frelinghuysen, was maintained, the question of the amount to which Mr. Reid was entitled by virtue of his service rendered and money expended in their behalf might have been considered and determined *de novo*. In reaching such determination the stipulations in the so-called assignment to Captain Reid, as to the amount of his compensation, would be persuasive only as to the rights of Mr. Reid, jr., if proper for consideration at all, since it has been determined that Captain Reid could not assign his rights and powers under that instrument, and therefore that Mr. Reid, jr., is not Captain Reid's successor thereunder, but a stranger to its provisions. Now, however, it appears that four-fifths of the fund has been distributed to those entitled thereto, and you have no further control over it.

Control of the fund was the only possible ground for any adjudication by the Secretary of State of Mr. Reid's right in it, and jurisdiction over the right was lost by the distribution of the fund.

Mr. Reid's suggestion that his present claim, which existed, if at all, as a charge against the whole fund, be charged upon the small balance still in your hands awaiting the call of its owner or owners, could not for obvious reasons be seriously entertained, much less adopted.

If any good ground exists for reopening Mr. Frelinghuy-

Improvement of Great Kanawha River.

sen's adjudication of this question, and I express no opinion upon the subject, a claim by Mr. Reid, jr., for a pro rata payment out of the balance in your hands or any increase in the allowance to him might be considered.

Very respectfully,
The SECRETARY OF STATE.

A. H. GARLAND.

IMPROVEMENT OF GREAT KANAWHA RIVER.

Advised that the provision in the act of August 5, 1886, chapter 929, namely: "Improving Great Kanawha River, West Virginia. Continuing improvement, one hundred and eighty-seven thousand five hundred dollars," does not, by implication, authorize the purchase of land for said improvement.

DEPARTMENT OF JUSTICE,
June 10, 1887.

SIR: Your letter to me of the 20th of April last states that the land originally needed for the site of lock and dam No. 2, Great Kanawha River, West Virginia, was acquired by deed and by condemnation under the provisions of the river and harbor act of March 3, 1881, chapter 136; that it is proposed to purchase additional land now found to be necessary for the same site, and pay for it out of the appropriation made by the river and harbor act of August 5, 1886, chapter 929; and requests that if such proposed purchase can be legally made under the provisions of the last mentioned act, the United States attorney for the district of West Virginia be instructed to prepare an abstract of the title to the premises, etc.

I have the honor to advise you that upon examination of the act of August 5, 1886, I entertain grave doubt whether the proposed purchase is authorized thereby. The only provision made by it for the Great Kanawha appears to be this: "Improving Great Kanawha River, West Virginia; continuing improvement, one hundred and eighty-seven thousand five hundred dollars." And unless authority to purchase land needed for the improvement is here necessarily implied such authority does not exist.

I find that similar provisions have been regarded by Congress as containing no implication of authority to make pur-

Klamath Indians.

chases of that character. Thus in the river and harbor act of 1881 above cited, in which many provisions of that kind appear, it was thought necessary to provide in express terms that "such parts of the money appropriated by this act for any particular improvement requiring locks and dams as may be necessary in the prosecution of such improvement may be expended in the purchase, voluntary or by condemnation, as the case may be, of necessary sites," etc. So in the river and harbor act of July 5, 1884, chapter 229, it is expressly provided "that out of the money herein appropriated for the Kentucky River the sum of two thousand dollars, or so much thereof as may be necessary, may be expended for the purchase of land for the construction of lock and dam at Beattyville, and so much thereof as may be necessary may also be expended for the same purpose at lock number six." These provisions of the acts of 1881 and 1884 indicate that legislation such as that of the act of 1886 quoted above is not meant by Congress to include the purchase of land, and that for this something more explicit is required.

The foregoing considerations seeming to me to render unnecessary at this time any investigation of title to the property which it is proposed to purchase, I have not sent any instructions to the United States attorney in reference thereto.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

KLAMATH INDIANS.

The Klamath River, where it flows through the Klamath Indian Reservation, is a navigable stream, in which the Indians occupying that reservation do not have an exclusive right to fish, but only a right in common with the public at large.

DEPARTMENT OF JUSTICE,

June 11, 1887.

SIR: The question presented by your communication of the 3d June instant arises upon the following state of facts:

On the 16th November, 1885, the President of the United

Klamath Indians.

States set apart as a reservation for the Klamath Indians "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River, for a distance of 20 miles, with the provision, however, that upon a survey of the tract a sufficient quantity be cut off from the upper end thereof to bring it within the limit of 25,000 acres authorized by law." (Executive orders relating to Indian Reservations, page 3037.)

The Klamath Indians, consisting of about 400, are self-supporting and rely for subsistence almost exclusively on the salmon with which the Klamath River abounds.

Within less than a month past a small steamer from Ellensburg, Oregon, has entered the Klamath River with the intention of fishing in that part of it flowing within the limits of the reservation, and as it is feared the Indians may resort to violence to repel what they regard as an invasion of their rights, an opinion is asked as to the power of the Government to protect these Indians in the enjoyment of what they claim to be "fishing privileges in the Klamath River within the limits of their reservation."

The Klamath River has been declared by the legislature of California to be "navigable from its mouth to the town of Orleans Bar," a point some distance above the eastern and upper limit of the reservation.

The Klamath River being a navigable stream, the public have the right to fish there and use it in any other way that does not amount to an interruption of or interference with interstate or foreign commerce or navigation, or a violation of some law of the State of California.

In the case of *McCready v. Virginia* (94 U. S., 391, 394), the Supreme Court says: "The principle has long been settled in this court that each State owns the beds of all tide-waters within its jurisdiction unless they have been granted away." (*Pollard's Lessee v. Hagan*, 3 How., 212; *Smith v. Maryland*, 18 How., 74; *Mumford v. Wardwell*, 6 Wall., 436; *Weber v. Harbor Commissioners*, 18 id., 66.) In like manner the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. (*Martin v.*

Telephone Lines.

Waddell, 16 Pet., 400.) The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.

It follows, then, that so long as the acts of persons resorting to these waters to take fish fall short of invading the right of Congress to regulate commerce with foreign nations or among the several States, no case for Federal interference can be said to exist.

Very respectfully yours,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

TELEPHONE LINES.

Telephone companies are not within the provisions of title LXV of the Revised Statutes, or entitled to avail themselves of the privileges thereby granted.

DEPARTMENT OF JUSTICE,

June 21, 1887.

SIR : On the 16th instant you submitted the following :

"The owner of a system of telephone lines reaching from Cœur d'Alene, Idaho, via Spokane Falls and other towns to Walla Walla, and thence to Pendleton, Oregon, proffers acceptance of the conditions prescribed in title LXV of the Revised Statutes, and solicits the privileges thereby granted to telegraph lines ; and the question is raised whether such a telephone company or line is within the category of the grantees of the privileges conferred by that statute. I respectfully request your opinion upon the point."

The subject of title LXV of Revised Statutes is telegraphs. In all its sections the words "telegraph," "telegraph company," and "telegram," define and limit the subject of the

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legislation. When the law was made the electric telegraph, as distinguished from the older forms, was what the law-makers had in view. The electric telegraph, when the law was made, as to the general public, transmitted only written communications. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed with the Postmaster-General, who had charge of the mail service. Under the several sections embraced in the title, in consideration of the right of way and the grant of the right to pre-empt 40 acres of land for stations at intervals of not less than 15 miles, certain privileges as to priority of right over the line, also the right to purchase, with power annually to fix the rate of compensation, were secured to the Government. Governmental communications to all distant points are almost all, if not all, in writing. The useful Governmental privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the law-makers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the title was passed. Telephone companies, therefore, are not within the "category of the grantees of the privileges conferred by the statute." If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative rather than administrative power.

I am, yours respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

Foreign Mail Service.

FOREIGN MAIL SERVICE.

Under section 398, Revised Statutes, the Postmaster-General has power, with the approbation of the President, to conclude a postal convention with a foreign country for admission to and transmission through the mails exchanged with such foreign country of parcels of mail matter of either class exceeding 4 pounds in weight. The limitation as to weight of mail packages in section 3879, Revised Statutes, applies only to domestic mail service.

DEPARTMENT OF JUSTICE,

June 30, 1887.

SIR: Your letter of the 27th instant received. You request an "opinion and advice whether the Postmaster-General, by and with the advice and consent of the President, under authority of section 398 of the Revised Statutes, can, by a postal convention with a foreign country, provide for admission to and transmission through the mails exchanged with such foreign country of parcels of mail matter of either class exceeding 4 pounds in weight." And you call my attention, in this connection, to the Postal Union Convention, wherein a weight of 4 pounds and 6 ounces is fixed as a limit.

Section 398 of the Revised Statutes reads as follows:

"For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries."

The only interpretation that has ever been given to the above section of the Revised Statutes will be found in 15 Opinions, 462, where Mr. Attorney-General Devens, in passing upon the authority of the Postmaster-General to negotiate a postal convention providing for the payment of indemnity for the loss of registered letters, says:

"In reply, I have the honor to say that the authority given to the Postmaster-General, by and with the advice and consent of the President, to negotiate and conclude treaties or conventions under section 398 of the Revised Statutes is a limited one, and must be construed in connection with the re-

Foreign Mail Service.

maining provision of the section that he may reduce or increase the rates of postage on mail matter between the United States and foreign countries. Undoubtedly, by such a convention, such reduction or increase may be agreed upon, and all matters may be provided for which are appropriate subjects of regulation by the Post-Office Department."

That authority has been conferred on the Postmaster-General under section 398 of the Revised Statutes to provide by postal convention with a foreign country for admission to and transmission through the mails exchanged with such foreign country of parcels of mail matter, of either class, exceeding 4 pounds in weight, can not be doubted.

These matters are appropriate subjects of regulation by the Post-Office Department; and, inasmuch as the statute in any case is paramount to any postal convention or treaty made pursuant thereto, such authority has not, by reason thereof, been abridged.

An examination of the treaty of the Postal Union Convention in connection with section 398, Revised Statutes, does not, however, disclose any conflict. No treaty or Postal Union Convention has been found subsequent to the one concluded June 1, 1878 (20 Stat., 734). By article 23 of said treaty—

"All stipulations of the treaties, conventions, arrangements, * * * in so far as those stipulations are not in accordance with the terms of the present convention are abrogated, without prejudice to the rights reserved by article 15 above."

By article 15 of the convention of the Universal Postal Union (20 Stat., 743) certain rights are reserved to the countries which become parties to the same by the signatures of their respective representatives.

The article reads as follows:

"The present convention involves no alteration in the postal legislation of any country as regards anything which is not provided for by the stipulations contained in this convention.

"It does not restrict the right of the contracting parties to maintain and to conclude treaties, as well as to maintain and establish more restricted unions, with a view to the improvement of postal relations."

Foreign Mail Service.

If I understand the question presented by you aright, the postal convention or treaty now under consideration, and which raises the question of your authority under the section of the Revised Statutes referred to, is for the purpose of maintaining and establishing a more restricted union with a foreign country, which is a party to the Postal Union Convention, with a view to the improvement of postal relations.

A precedent is found in the agreement made with the Republic of France, November 13, 1880, under the reservations and in the exercise of power contained in Article XV of the convention of the Universal Postal Union, concluded at Paris on the 1st June, 1878. (21 Stat., 786.)

Unless there is some act of Congress limiting the grant of power conferred on the Postmaster-General by section 398 of the Revised Statutes, your proposition, considered in connection with such section and the Postal Union Convention, must be answered in the affirmative.

The only limitation as to the weight of mail packages is found in section 3879 of the Revised Statutes, which provides that "No package, weighing more than four pounds, shall be received for conveyance by mail, except books published or circulated by order of Congress."

By a careful examination of sections 398 and 3879 of the Revised Statutes it will be seen that they were enacted for different purposes, and the latter does not limit the provisions of the former. The former relates to the foreign and the latter to the domestic mail service. That such was the intention of Congress is shown by the manner the respective sections were originally enacted, as well as by the manner of their transfer into the revision of the statute laws.

In the Revised Statutes, section 398 appears in Title IX which prescribes the general powers of the Postmaster-General, as well as the duties of subordinate officers of the Post-Office Department, but section 3879 is placed in chapter 3 of Title XLVI which regulates domestic mail matters. This clearly shows the distinct objects of the two sections. And this view of the intention of Congress is further sustained by examination and consideration of the act of June 8, 1872, chapter 335 (17 Stat., 301, 304).

Sections 134 and 167 of the act of June 8, 1872, correspond

Kansas and Arkansas Valley Railroad Company.

with sections 398 and 3879 of the Revised Statutes. The respective positions in which the two sections are placed in the act of June 8, 1872, show that it was not intended to make the one limit the powers granted by the other, or that there should necessarily be any material connection between the same.

Upon careful examination of the question I have reached the conclusion that section 398 relates to the foreign and section 3879 to the domestic mail service, and that such sections were enacted for distinct objects.

This construction gives full force and operation to these sections of the same act, which is one of the elementary rules of construing statutes.

I am of the opinion, therefore, that you have the power, under section 398, Revised Statutes, by and with the advice and consent of the President, to conclude a postal convention for the purpose mentioned in your communication.

Respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

KANSAS AND ARKANSAS VALLEY RAILROAD COMPANY.

Under the act of June 1, 1886, chapter 395, authorizing the Kansas and Arkansas Valley Railway Company to construct a railroad through the Indian Territory, that company has no right to go beyond the limits of the right of way therein prescribed for the purpose of taking timber or other materials for the construction of such railroad.

The courts named in the eighth section of that act have jurisdiction over controversies between said company and the Cherokee Nation growing out of the taking of timber and other materials by the former beyond said limits. But the right of the Cherokees to go into court does not diminish in any degree the duty of the Executive Department of the Government to use its power for their protection.

DEPARTMENT OF JUSTICE,

June 30, 1887.

SIR: The questions submitted by your communication of the 16th instant, growing out of the claim of the Kansas and Arkansas Valley Railway Company to have authority to go outside of the limits of their right of way through the reser-

Kansas and Arkansas Valley Railroad Company.

vation of the Cherokee Nation of Indians and take from the reservation such timber and other materials as may be needed for the construction of its railway, are as follows:

"Whether under the grant contained in the act the company is authorized to proceed with the work of construction, taking material of earth, sand, stone, and timber for that purpose from the common domain outside of but adjacent to the right of way, or whether the disputes now existing between the company and the nation in relation thereto are not properly referable to the courts under the eighth section of the act above quoted; and, if so, what, if any, action shall be taken by the Department looking to permission or prohibition of construction pending judicial decision on the point at issue."

The Kansas and Arkansas Valley Railway Company is a corporation created by the State of Kansas, and its authority to project, build, and operate a railway through that part of the Indian Territory reserved for the use of the Cherokee Nation is derived from an act of Congress approved 1st June, 1886, chapter 395, entitled "An act to authorize the Kansas and Arkansas Valley Railway to construct and operate a railway through the Indian Territory, and for other purposes." (Pamphlet laws, 1885-'86, p. 73.)

I shall first address myself to the question whether it was the intention of Congress by the act referred to to give this company authority to leave the limits of their easement over the reservation for the purposes above mentioned.

As it will be found to have some bearing on this question, I propose to begin by considering, briefly, the character of the title by which the Cherokee Nation holds the country traversed by the line of the railway.

The Cherokees were among the most powerful of the aboriginal nations, and occupied the principal part of the country now comprising the States of North and South Carolina, Georgia, Alabama, and Tennessee. It was as the result of several treaties that they relinquished that great domain and were finally seated in comparatively limited territory now occupied by them, and which was accepted by them as an exchange for the territory they had abandoned and ceded to the United States.

Kansas and Arkansas Valley Railroad Company.

The territory thus accepted, the United States, by repeated treaties, pledges its faith shall be a "permanent home" (treaty 28 May, 1828, preamble, 7 Stat., 311) to the Cherokees, and "be and remain theirs forever" (*ibid.*), and guaranties them "the quiet and peaceable possession of their country," and that it shall be conveyed to them by patent subject to the single condition that the lands ceded shall "revert to the United States" in case the Indian grantees shall become extinct or shall abandon them. (Treaty 12th April, 1834, 7 Stat., 414; act 28 May, 1830, sec. 3, 4 Stat., 411.)

It was in the state of things produced by these treaties that Congress passed the act of 1st June, 1886.

The first section provides "that the Kansas and Arkansas Valley Railway, a corporation created under and by virtue of the laws of the State of Arkansas, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using and maintaining a railway and telegraph and telephone line through the Indian Territory," and then goes on to name the terminal points and courses of the main and branch lines.

The second section is in these words:

"That said corporation is authorized to take and use for all purposes of a railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Kansas and Arkansas Valley Railway, and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations for every ten miles of road with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill: *Provided*, That no more than said addition of land shall be taken for any one station: *Provided further*, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any por-

Kansas and Arkansas Valley Railroad Company.

tion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall have been taken."

With the exception of the eighth section, which will be considered with some particularity further on, the other sections of the law have no application to the questions submitted, and therefore call for no further reference.

It appears, then, that if the right exists, as claimed, of going outside of the limits of the right of way granted for the purpose of taking timber or other materials for the construction of the railway, it must be found somewhere in the first or second sections or both together.

Looking then at the first section, I do not think it possible to infer such a right in the company from the power given it to locate, construct, own, equip, operate, use and maintain a railway and telegraph and telephone line, because the grant of power to do any or all those things does not involve a grant by implication of the materials, any more than of the money, which the company must be able to command before it can put in operation the faculties so derived. I have never understood that granting a license to do a thing entailed the further duty of putting the licensee in a condition to enjoy his privilege. As well might it be said that the language of this particular section afforded ground for the claim of an obligation on the part of the government to indorse the bonds of the company.

Coming now to the second section, I see nothing whatever that looks to a right in the company to go beyond the limits therein designated; on the contrary, I discover a plain indication of purpose that the company shall keep within those limits. It is authorized "to take and use for all the purposes of a railway, and for no other purpose, *a right of way one hundred feet in width*," with an additional width for stations, etc., language which, to my mind, is quite at war with any co-existent right in the company to overstep the boundaries given in the law.

Indeed, Congress, *as if to prevent implications of any sort* in a matter so delicate as that of giving a right of way through lands covered by a government patent or its full equivalent, a treaty operating as a grant, has taken care to

Kansas and Arkansas Valley Railroad Company.

be express in a particular where, if it had remained silent, an implication of a right in the company to cross the limits of the easement might possibly have been raised; for it has said that in cases where "heavy cuts and fills" require more than the prescribed width, the company may use the additional land necessary "*not exceeding one hundred feet in width on each side of said right of way.*" This looks very much like a manifestation of purpose that nothing shall pass to the company that is not granted by express language.

I am, therefore, unable to find any support for the company's claim in the second section.

This brings me to the second question, namely, whether the disputes between the Cherokee Nation and the railway company, growing out of the latter's taking timber and other materials outside the limits of the easement, are not to be compared and settled by the courts under the eighth section of the act, "and, if so, what, if any, action shall be taken by the Department looking to permission or prohibition of construction pending judicial decision on the point at issue."

The eighth section, to which you refer, is as follows:

"That the United States circuit and district courts for the western district of Arkansas and the district of Kansas, and such other courts as may be authorized by Congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Kansas and Arkansas Valley Railway and the nations and tribes through whose territory said railway shall be constructed. Said courts shall have the jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this act."

The language of this section is so broad that I can not doubt it was the purpose of Congress to give the courts therein named jurisdiction over such a controversy as the Cherokees have with the railway company for trespassing on their domain; but I do not understand that the right of the Cherokees to go into court, thus conferred, diminishes in

Interstate Commerce Commission.

any degree the duty of the Executive Department of the United States to use its authority to protect them against what the Department may regard as violations of their rights. And to this end the Department has the remedies at hand that are provided by law for the protection of the Indians under its general control and supervision.

If convinced the company is violating the rights of the Indians, you should notify it to desist, and to make reparation for any damage it may have already done; and failing to do this according to your notice, and the facts sent to this Department, proper steps will be taken in the premises.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

INTERSTATE COMMERCE COMMISSION.

By the provisions of the act of February 4, 1887, chapter 104, creating the Interstate Commerce Commission, the terms of the five Commissioners first appointed thereunder must be computed from January 1, 1887, although their appointments were made March 22, 1887.

But they are entitled to draw pay only from the time they entered upon the discharge of their duties respectively.

DEPARTMENT OF JUSTICE,

July 5, 1887.

SIR: Your letter of the 28th ultimo submits for opinion two questions: (1) "When, under the interstate-commerce law, the terms of the Commissioners begin," and (2) "from what date are they entitled to draw their salary?"

The eleventh section of the act of Congress entitled "*An act to regulate commerce*," approved 4th February, 1887 (Acts Second Session Forty-ninth Congress, Pamphlet Edition, page 379), provides "That a commission is hereby created and established, to be known as the Interstate Commerce Commission, which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of

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two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed."

On the 22d March, 1887, the President, pursuant to this law, appointed five Commissioners to serve respectively for the periods of two, three, four, five, and six years from the 1st January, 1887, who have all entered on the duties of their office, but I am not informed when they did so respectively.

As the law provides that the Commissioners "first appointed" shall continue in office for a "term" to be computed from the 1st of January, 1887, and that "the *term* of each shall be designated by the President," I have no doubt that reference must be had to the 1st of January, 1887, as the point from which to reckon the official term of each of these first appointees, although his appointment did not take place, in fact, until the 22d of March, 1887, for such is the clear intention of Congress, and effect must be given to it. It is true that it does not often occur that the term of a civil office covers a period during which the appointee could not have performed service, but such a thing is very common in the military and naval service, where increased rank is frequently conferred on an officer from a date sometimes years anterior to the appointment that conferred it.

Having now disposed of the first question, I am brought to the second, as to the time from which the Commissioners are entitled to draw their salaries.

It by no means follows that because their term of office begins on the 1st day of January, 1887, the Commissioners are entitled to be paid from that day. On the contrary, it has been settled by a long and unshaken usage of the Government, supported by repeated opinions of my predecessors, that when Congress is silent on the subject, an officer's salary begins only from the time when he commences to do some official act, or, in some cases, particularly in the Army and Navy, presents himself for assignment to duty. This is well illustrated by the case of Judge Brocchus, who was appointed

Interstate Commerce Commission.

a Territorial judge, but having, for some reason, failed to qualify, was superseded. His claim for pay was denied on the ground that he had not taken the oath of office or entered upon its duties, although he had formally accepted the appointment. (10 Opin., 308.)

This practice has been steadily adhered to in cases arising in the Army and Navy where claims have been made for the pay of an increased rank during the interval between the date from which the rank took effect, by relation, to the date of the appointment, *except in cases where the officer promoted has in fact performed the duty proper to the increased rank during the interval* and was legally assignable to that duty.

So, also, when an officer improperly dismissed from the service has been restored with the rank to which he would have been entitled had the injustice not been committed, it has been uniformly held that a claim for pay during the time he was out of the service was not maintainable, in the absence of some statute to that effect.

Said Mr. Attorney-General Clifford in *Du Barry's case* (4 Opin., 608): "It would be absurd to hold that the pay of an officer might commence before he was appointed or commissioned, and equally so to allow him to receive compensation under his commission when no service had been rendered to the Government for a period of time before it was in existence. The rule, if adopted, would authorize the Executive to bestow gratuities to an alarming extent without the consent of the House of Representatives, and that, too, as it seems to me, in direct violation of law and of the Constitution." See also 2 Opin., 27, 638; 3 Opin., 105, 124, 641; 4 Opin., 123, 256, 318, 348; 5 Opin., 132; 7 Opin., 304; 10 Opin., 250, where the positions above taken are fully sustained. The opinion of Mr. Attorney-General Cushing in 7 Opinions (*supra*) would seem to meet the question directly.

So that the statute creating the Commission, for certainty and uniformity, fixes the period at which the terms of the Commissioners shall commence; but being silent as to when their pay shall begin, we are left to the general principle upon which such question has heretofore been determined.

It follows, then, that the Commissioners under the inter-

Chiriqui Improvement Company.

state-commerce law can draw pay only from the time they entered upou their duties respectively.

I have the honor to be, sir, your most obedient servant,
A. H. GARLAND.

The PRESIDENT.

CHIRIQUI IMPROVEMENT COMPANY.

The instrument (set out in the opinion) signed by Ambrose W. Thompson, for himself and the Chiriqui Improvement Company, and Isaac Toucey, Secretary of the Navy, dated May 21, 1859, is in no sense a contract obligatory upon the United States.

The appropriation of \$200,000, made by the act of March 3, 1881, chapter 133, "To enable the Secretary of the Navy to establish at the Isthmus of Panama naval stations and depots of coal for the supply of steam-ships of war," has no application thereto.

DEPARTMENT OF JUSTICE,
July 7, 1887.

SIR: Your communication of the 23d June last presents for opinion the following case:

By an act approved 3d March, 1881 (21 Stat., 448), being the sundry civil appropriation act, it was, amongst other things, provided as follows:

"To enable the Secretary of the Navy to establish at the Isthmus of Panama naval stations and depots of coal for the supply of steamships of war, two hundred thousand dollars, to be available for expenditure as soon as suitable arrangements can be made to the proposed end."

The money thus appropriated has never been applied to the object mentioned in the law, although still available for that purpose.

It is claimed by the Isthmus Pacific Railway Company, as the representative or successor of the Chiriqui Improvement Company, and the claim is pressed with much industry, that this appropriation of \$200,000 was intended by Congress to be paid as the consideration for the benefits secured to the Government by an alleged contract made by the United States through Isaac Toucey, Secretary of the Navy, of the first part, and the Chiriqui Improvement Company and Ambrose W. Thompson, of the second part, on the 21st May, 1859, which is in the following words:

Chiriqui Improvement Company.

"This indenture, made this twenty-first day of May, A. D. 1859, between the United States, acting by and through Isaac Toucey, Secretary of the Navy of the United States, of the first part, and the Chiriqui Improvement Company and Ambrose W. Thompson, of the second part, witnesseth:

"That, whereas, the said Chiriqui Improvement Company and the said Thompson have become possessed of certain grants, concessions, privileges, rights, and properties, at the isthmus of and in the province of Chiriqui, in the Republic of New Granada, as appears by the original title thereto, copies of which are hereto appended; and, whereas, it is desirable that the United States on the one part should have the right of transit over the roadway granted direct to said Ambrose W. Thompson through said province and extending from the Caribbean Sea to the Pacific Ocean, and the further right to use as harbors the waters, gulfs, bays, or lagoons, sheltered or partially surrounded by the lands of the said Thompson or the said improvement company, and the further right to use the coal contained in portions of said lands for naval purposes, as also the right to establish coal depots and naval stations.

"Therefore, in consideration of the payments and covenants hereinafter stipulated and set forth, it is mutually agreed between the parties aforesaid as follows:

"First. The United States for the consideration herein-after named shall have and enjoy a right of way or transit over said right which is hereby granted to them by the party of the second part, free from all tolls or taxes upon officers, agents, seamen, landsmen, mails, munitions, stores, troops, or any direct property of the United States which the Government thereof may transport or cause to be transported over the said road during the continuance of the present grant made by the said Province of Chiriqui to the said Ambrose W. Thompson.

"Second. It is hereby agreed by and between the said parties of the first and second part that there shall be selected and set apart such lands, not exceeding 5,000 acres, on each side of the Province or Isthmus of Chiriqui as may be necessary for said United States for coal depots and naval stations at the Lagoon of Chiriqui and the Harbor of Golfito,

Chiriqui Improvement Company.

the same to be located at such points as will secure good and sufficient depots and stations to the United States without impairing the general value of any site for city or cities which may be laid off by said party of the second part on any of said lands. The said lands to be selected and designated either on the main land or island or both, as the United States may determine, and within twelve months from the date hereof; and the said party of the second part hereby conveys the said lands to be so selected to the United States, together with all the timber thereon, and covenants to execute such further conveyances as may be necessary to vest in them a good and sufficient title as derived from the said grants.

“Third. The United States shall have the right, and the same is hereby conveyed, to use as harbors the waters of the lagoons, bays, or gulfs, sheltered or partially surrounded by the lands of the said Thompson or the said Chiriqui Improvement Company on the Atlantic and Pacific sides of the aforesaid Isthmus, and in the bays and gulfs wherever the lands of the said Thompson or said company may extend.

“Fourth. The United States shall have the right, and the same is hereby conveyed, to all coal for naval purposes, at or near the points selected for coal depots and naval stations, as aforesaid, but if coal shall be found of superior quality for steam purposes in other places than those so selected, then the United States shall have the right, and the same is hereby conveyed, to use the same, subject only to the tax of one dime per ton, as provided to be paid to the provincial authorities of Chiriqui, in the grant aforesaid, and the cost of mining and delivering the same.

“Fifth. The United States hereby agree, in consideration of the grant of a right of way and free transit over the said road and for the harbors, lands, mines, concessions, privileges, rights and enjoyments, hereby made and conveyed to them, to pay to the said Ambrose W. Thompson, for himself and said Chiriqui Improvement Company, the sum of three hundred thousand dollars; provided Congress shall approve this contract and make the necessary appropriations therefor at its next session, otherwise this contract shall be void.

“In witness whereof, the said Isaac Toucey, Secretary of the

Chiriqui Improvement Company.

Navy, for and on the part of the United States Government, and the said Ambrose W. Thompson, for himself and as the duly authorized attorney in fact for the said Chiriqui Improvement Company, have signed, sealed, acknowledged, and delivered this agreement in duplicate the day, month, and year first herein written.

“AMBROSE W. THOMPSON, [L. S.]

“*For himself and the Chiriqui Improvement Company.*

“ISAAC TOUCEY, [L. S.]

“*Secretary of the Navy.*

“In presence of—

“CHAS. W. WELSH.”

On the 22d June, 1860 (12 Stat. 83), Congress appropriated \$10,000 “to enable the President to send some competent person or persons to the Isthmus of Chiriqui, whose duty it shall be to examine into and report upon the quality and probable quantity of coal to be found there, upon the lands of the Chiriqui Improvement Company; upon the character of the harbors of Chiriqui Lagoon and Golfito; upon the practicability of building a railroad across said isthmus, so as to connect said harbors; and generally upon the value of the privileges contracted for in a conditional contract made on the twenty-first day of May, eighteen hundred and fifty-nine, between Isaac Toucey, the Secretary of the Navy of the United States, and Ambrose W. Thompson and the Chiriqui Improvement Company: *Provided*, That nothing herein contained shall be construed as a ratification of the said contract.”

After the passage of this law, to wit, on 4th August, 1860, the following memorandum was made as supplemental to the alleged contract.

“It having been agreed during the last session of Congress that the time limited by this contract within which Congress should approve it and make the necessary appropriation therefor should be extended to the end of the next session, it is now in fulfillment thereof agreed on both parts of the original contract that such extension shall take place and the time is hereby extended accordingly. And it is further agreed that the United States shall have the full bene-

Chiriqui Improvement Company.

fit for the purposes of this contract which the said Ambrose W. Thompson or the said Chiriqui Improvement (Co.) has obtained or shall obtain from the Government of Costa Rica for a railroad between the Gulf of Golfito Dulce and the Chiriqui Lagoon or any part of the way between those places or between any other points on the Atlantic and Pacific.

"August 4, 1860.

"AMBROSE W. THOMPSON, [L. S.]

"*For himself and the Chiriqui Improvement Co.*

"ISAAC TOUCEY, [L. S.]

"*Secretary of the Navy.*

"In presence of —

"CHAS. W. WELSH."

Since the appropriation of the 22d June, 1860, there has been no legislation up to the 3d March, 1881, which has any relevancy to the question submitted, which is in these words:

"Whether the contract entered into May 21, 1859, between the United States, represented by Isaac Toucey, Secretary of the Navy, of the one part, and the Chiriqui Improvement Company, represented by Ambrose W. Thompson, of the other part, for the acquisition by the United States of certain lands, rights, and privileges therein mentioned, which contract was made subject to the condition that the same should be approved and ratified by Congress at the then next session thereof, and which condition was, by a further agreement, dated August 4, 1860, so extended as to include the second session of the Thirty-sixth Congress, is or is not a valid subsisting contract?"

The paper writing bearing date 21st May, 1859, was in no sense a contract. The Secretary of the Navy had no authority to pledge the United States in any such way, nor did he propose to do so, for it is expressly stated in the paper that it is conditioned upon the approval of Congress and upon its making the necessary appropriation.

I see nothing in the legislation on the subject that indicates an intention on the part of Congress to make the United States a party to the scheme or proposition made to Congress by the Secretary of the Navy, Mr. Toucey, and the Improvement Company and Mr. Thompson.

Chiriquí Improvement Company.

The language in which is made the appropriation of the act of the 3d of March, 1881, is perfectly clear and entirely free from ambiguity, and I can not possibly leave the plain words of the law, which contain no reference to the alleged contract, and resort to extraneous matter of any kind for the purpose of finding a pretext for making the law applicable to the alleged contract and giving it a sense which its language taken by itself does not convey. In my opinion this would be *legislation*, and *not interpretation*.

It is time enough to look outside of a law for aid in getting at its meaning when a doubt arises on its face; but where the language of the law is "plain and unambiguous," say the Supreme Court of the United States (6 Wall., 479, 480), there is no "*room for construction*."

To yield to the argument of the counsel for the Isthmus Pacific Railway Company would be to deprive the Secretary of the Navy of the wide discretion given him by the act in the matter of establishing naval stations and coal depots, by holding his function to be simply the ministerial one of paying the money appropriated for the fulfillment of a binding contract, and that, too, in the face of the language that the appropriation is to be available for expenditure "*as soon as suitable arrangements can be made to the proposed end*," which does not look much like Congress considered the Secretary's hands as tied by a contract.

It results, then, that the paper writing relied on as a contract has never possessed that element in the least degree.

Very respectfully, yours,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

Klamath Indians.

KLAMATH INDIANS.

The Attorney-General deems it inexpedient to express an opinion upon certain questions proposed, relating to a right of fishery in the Klamath River, California, claimed in behalf of the Klamath Indians; such questions being justiciable in the appropriate courts at the suit of the Indians themselves who are interested in them.

DEPARTMENT OF JUSTICE,

July 11, 1887.

SIR: Your communication of the 7th instant, submits for opinion a series of questions.

The first relates to a claim to a right of fishery by prescription in the Klamath River set up by the Indian Bureau in behalf of the Klamath Indians; the second asks to know whether such right, if established, is not protected by the treaty of Guadalupe Hidalgo; the third asks if the legislation and executive action resulting in fixing the limits of the reservation occupied by these Indians was not a recognition of their exclusive right to fishing privileges within the limits of the reservation; the fourth inquires whether, if such treaty and prescriptive rights exist, the State of California can divest them; and the fifth asks whether the Indians can not be protected by the Department of the Interior in these rights if they should appear to exist.

The matters covered by these questions are clearly justiciable in the appropriate courts at the suit of the Indians themselves who are interested in them. They are essentially judicial in their character, and as each is readily resolvable into a case at law or in equity, I do not see how it can be said to be a question arising in a course of executive administration.

There is nothing in the nature of the protectorate or guardianship exercised by the United States over the Indian tribes that warrants the Executive Department of the Government in assuming to determine a controversy properly cognizable by the Judicial Department of the Government, because the well-being of an Indian tribe requires that such controversy should be decided. The organic distinctions between the three great divisions of Government established by the Constitution must be respected or collisions and discord inimical to good government will inevitably take place.

Sureties for the Performance of Contracts.

When the questions arose between the State of Kansas and the Shawnee and Miami and Wea Indian tribes as to the power of the State to tax certain lands held in severalty by individuals of these tribes, the three tribes filed bills in equity against the State officials seeking to enforce the right to tax, and the suits thus brought were finally determined in favor of the Indians by the Supreme Court of the United States, (*The Kansas Indians*, 5 Wall, 737; see also the case of *The New York Indians*, *Ib.* 761.)

My predecessor, Mr. Butler, declined to pass upon claims arising under a treaty with the Cherokee Indians, on the ground that a board of commissioners had been established by the treaty for the purpose of determining cases of that kind, saying that the Attorney-General had "no power to give an official opinion, on the request of a head of a department, except on matters that concern the official powers and duties of such department," (3 Opin. 369; see also section 356 Rev. Stat., and 13 Opin. 160 and 11 Opin. 407.)

It seems to me, therefore, that as the only way to settle the questions submitted is by judicial proceedings it would be hardly proper for me to express an opinion on them, while my doing so might, at the same time, be regarded as an attempt of the Executive branch of the Government to fore-stall such proceedings.

Very respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SURETIES FOR THE PERFORMANCE OF CONTRACTS.

Under section 7 of the act of August 3, 1886, chapter 849, authorizing proposals for certain work to be invited, which shall be subject to "such provisions as to bonds and security for the quality and due completion of the work as the Secretary of the Navy shall prescribe," the Secretary may, in his discretion, accept as surety (instead of an individual) a body corporate empowered to assume that relation.

DEPARTMENT OF JUSTICE,
July 15, 1887.

SIR: Your communication of the 11th instant and the inclosures therein mentioned present the following case:

Sureties for the Performance of Contracts.

By an act of Congress approved 3d August, 1886, section 7, the Secretary of the Navy is required, before making contracts for the construction or completion of the vessels whose construction or completion is authorized by the act, to invite proposals for the work, which shall be subject, amongst other regulations, to such "*provisions as to bonds and security for the quality and due completion of the work as the Secretary of the Navy shall prescribe.*"

Invitations for proposals under the act have been made, and several contracts have been awarded to the Bethlehem Iron Company, a Pennsylvania corporation, which offers as its surety the Guarantee Company of North America, or the American Surety Company, corporations existing under State authority, and empowered to contract as sureties or guarantors.

The question arising upon this state of facts is presented by you in the following words:

"Can the Secretary of the Navy, under existing law, accept as security for the performance of a contract in which the United States are concerned, the obligation of a company incorporated and acting under State law, in lieu of the obligation of an individual surety or sureties, and, if so, what conditions are necessary to be observed with reference to a determination of the question whether such security, when tendered, is or is not to be deemed adequate and sufficient for the protection of the United States as a party to the contract to which it relates?"

I prefer to answer this question with a view to the facts of the actual case before me, and not with reference to contracts of every kind in which the Government may be interested, which is understood to be the scope of the question.

Looking at the wide discretion given you by the seventh section of the law, I have no doubt that the matter of security is entirely within your discretion, unconfined by previous law or practice, and, consequently, that under this section you can accept any body corporate as surety that may be empowered to assume that relation and is in your judgment sufficient, the sufficiency of such body corporate to be determined by you after proper inquiry, the nature and extent of which is lodged by the law in your sole discretion.

Customs Duties.

It occurs to me, however, to say that it may be worthy of consideration whether the possibility that the more onerous condition impliedly stated in your advertisements, that successful bidders should furnish *individual* sureties, might not have deterred persons from bidding who might have bid had they known that security or guaranty companies would be accepted as sureties.

I have the honor to be, sir, your obedient servant,
A. H. GARLAND.

The SECRETARY OF THE NAVY.

CUSTOMS DUTIES.

Advised, that the classification of roll paper heretofore adopted under paragraph 392, Tariff Index, new, should be adhered to.

DEPARTMENT OF JUSTICE,
August 4, 1887.

SIR: In reply to your letter of the 30th ultimo, submitting the inquiry "whether the decision of the court in the cases of the *Scoville Manufacturing Company v. Robertson*, and *Gottlieb Gennert v. Robertson*, should be acquiesced in and accepted by the Department as determining the classification of roll-paper, without further litigation," in an opinion rendered on the 4th of April, ultimo, I certified that no appeal would be taken in the first case mentioned, and as the verdict and judgment were in favor of the collector in the latter case, that judgment, on the part of the Government, should not be questioned. So far as those cases are concerned, the judgment should be accepted as final.

The substantial inquiry to be answered is: Should the Department accept the decision of those cases as a final determination of the classification of roll paper?

In the case of *Gennert v. Robertson*, as reported by the United States attorney, the real question of classification submitted in yours was not passed upon. With reference to the case of the *Scoville Manufacturing Company v. Robertson*, my opinion of the 4th of April, ultimo, concurred with that of the court as to sensitized and albumenized paper. The

Customs Duties.

court submitted to the jury, under the evidence, the question "as to whether or not the plaintiff had proven the roll paper to be a manufacture of paper." The jury found for the plaintiff on this question. The report of the United States attorney in that case does not furnish the evidence, if any was given, on the part of the plaintiff, nor show that any evidence was offered on the part of the Government, with reference to the questions submitted and passed upon by the jury. The case, therefore, from the papers before me, affords no real guide as to the construction of the customs acts as to the classification of roll paper. The two paragraphs to be construed in determining the classification are paragraph 388, Tariff Index, new, as follows: "Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act, fifteen per centum ad valorem," and paragraph No. 392, Tariff Index, new, "Paper hangings, and papers for screens or fire boards, paper antiquarian, demy, drawing, elephant, foolscap, imperial letter, note, and all other paper not specially enumerated or provided for in this act, twenty-five per centum ad valorem."

The fact that the manufactured material is subject to but 15 per centum ad valorem, while the unmanufactured is charged 25 per centum, in the paragraphs quoted, is an exception to the general policy of the tariff laws. That such exception exists is the real cause of the complaint of the manufacturers to whom you refer. The policy of the exception has been passed upon by Congress; its reason or propriety we can not question. The report of the assistant appraiser of the port of New York, approved by the appraiser, finds that the roll paper submitted is "a fine quality of plain paper, which has undergone no further process of manufacture than various other plain papers provided for under paragraph 392, Tariff Index, new." Under this statement of fact, the classification of roll paper heretofore adopted under paragraph 392, Tariff Index, new, should be adhered to.

I am, yours, respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Distribution of Arms to the Militia.

DISTRIBUTION OF ARMS TO THE MILITIA.

Provisions of section 1661 Revised Statutes, and of the act of February 12, 1887, chapter 129, touching the distribution of arms to the militia of the several States and Territories, considered.

Where a State or Territory had an unexpended balance to its credit, under the old law, on June 30, 1887, which still remains available, such balance can be drawn upon to supply ordnance stores to it.

But where the quota belonging to any State or Territory, under the old law, has been overdrawn, the amount overdrawn is not to be charged to such State or Territory under the new law.

DEPARTMENT OF JUSTICE,

August 9, 1887.

SIR: Your letter of the 6th instant, referring to section 1661 of the Revised Statutes, and the act amending it of the 12th of February, 1887 (24 Stat. 401), submits the following inquiries:

(1) "Whether the States and Territories which had balances to their credit on June 30, 1887, under the old law, can draw that balance in ordnance stores.

(2) "Whether the amounts which certain States, Territories, and the District of Columbia have overdrawn under the old law, shall be charged to them under the new law, and be transferred from their respective quotas of the new appropriation to liquidate such indebtedness."

The first question refers to balances unexpended under the act of the 23d of February, 1808, re-enacted as section 1661 of the Revised Statutes. This section is a permanent annual appropriation made to procure arms and equipments to be distributed by the United States, through the medium of the several States and Territories, to the whole body of militia. By the act of 1808 and its amendment of 1855 the quota or proportion of arms to which each State shall be entitled is severally fixed. A proportionate part of the annual appropriation is provided to purchase the arms for each. The distribution is required to be made annually. This provision should have been observed, but its non-observance does not, of itself, cover the unexpended quota of the money provided to purchase the arms into the Treasury. The act of the 12th of February, 1887, does not repeal the act of 1808, but supplies its place as to appropriations after the time when the

Distribution of Arms to the Militia.

appropriation provided by the latter act becomes effective, which is the 1st of July, 1887. If there is available, under the old law, an unexpended balance which belongs to the quota of any particular State or Territory, which has not been or is not required to be covered into the Treasury, it may be drawn upon to supply ordnance to such State or Territory to the extent of such unexpended available balance, but no portion of the balance of one State or Territory can be applied to the use of another. I therefore answer your first inquiry in the affirmative.

The act of 1808, with its amendments, contemplated a distribution of *arms* to the militia of the United States. By its provisions the States were only the mediums or agents, under their own laws and regulations, to effect this distribution. If these agents faithfully distributed the arms furnished to the militia for the purpose intended their duty was performed. There is no provision for accountability or return. Under the law no State could rightfully receive more than its own annual quota. If more arms were received by any State than the law authorized, it was done wrongfully or without law. If such arms, wrongfully received, are yet in the possession of any State, they should be reclaimed. If they have been wrongfully disposed of their value would be a debt owing to the United States. The act of 1887 does not appropriate any money to the several States which could be retained against money owing from a State. It only authorizes a loan of arms to the State, the right of property, and absolute ownership of which, at all times, remains in the United States. The Department would not be justified under the law in refusing this loan of arms to such State or States as might be indebted to the Government for unliquidated amounts arising from either torts or contracts. Your second inquiry is therefore answered in the negative.

I am, yours, respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF WAR.

Compensation of District Attorneys.

COMPENSATION OF DISTRICT ATTORNEYS.

District attorneys are entitled to special compensation for their services in examining titles to lands purchased by the United States.

The Attorney-General is invested with sole authority to employ and fix their compensation where the performance of such services by them is called for.

Expenses thus arising, including office fees for searches, copies of record, etc., being incidental to the purchase of the land, are ordinarily to be paid out of the appropriation made for the purchase.

DEPARTMENT OF JUSTICE,

November 1, 1887.

SIR: In your letter of the 16th ultimo, after mentioning a number of bills of different district attorneys (which have been referred to your Department) for services performed and expenses incurred by them in the investigation of titles to lands authorized to be acquired for sites for public buildings in their respective districts, you, in connection therewith, direct my attention to the provisions of sections 189, 355, 767, 823, 835, 843, 1764, and 1765, Revised Statutes, and inquire "whether, in view of these provisions, the Secretary of the Treasury can lawfully pay such bills out of any appropriation which is under his control."

I beg to state, in reply, that the question whether a district attorney is entitled to special compensation for his services in examining titles to lands proposed to be purchased by the United States has been passed upon by several of my predecessors in office, and they have uniformly held that he is entitled thereto, upon the ground that such services are not covered by the statutory provisions prescribing his fees, etc. See opinion of Mr. Cushing, dated January 25, 1855 (7 Opin., 46); of Mr. Speed, dated March 8, 1866 (11 Opin., 431); and of Mr. Browning, dated June 12, 1868 (12 Opin., 416). These opinions, it is true, all bear date prior to the enactment of the Revised Statutes, but at the time they were given the law regulating and fixing the compensation of district attorneys was in the main substantially the same as at present. Statutory provisions then existed corresponding to those contained in the above-mentioned sections (excepting section 189, as to which see below) so far as the latter are material to the consideration of the subject now in hand.

Compensation of District Attorneys.

After referring to the act of February 26, 1853, chapter 80, by which the fees of district attorneys, etc., were then defined, Mr. Cushing, in his opinion above cited, observes: "That act provides no fee for this duty, although it is required of district attorneys to make such examination of titles and abstracts thereof for the information of the Attorney-General to enable him to pass on titles according to the provisions of the joint resolution of September 11, 1841 (5 Stat., 468). The duty is a delicate and important one, requiring legal science and much care and personal attention. On the whole, it seems to me reasonable to consider the act of 1853 as providing the fees only of the duties enumerated, and that for duties not enumerated he is to have a fee either in the analogy of those fixed by the act, or at the sound discretion of the head of Department ordering the service." He adds that the fee, when determined, should be "charged to the appropriation for the particular purchase of which there may be question."

Mr. Browning, in the opinion above referred to, remarks: "These services not being among the enumerated duties of those officers for which compensation is prescribed in detail by the statute regulating their fees, they have been regarded as extra official services, to be paid for out of the appropriate funds of the Department at the request whereof, or in connection with whose administration, they were rendered."

By the act of February 26, 1853, already cited, it was provided that for the services of counsel, rendered at the request of a head of a Department, the compensation should be such sum as might be stipulated or agreed on. This provision recognized the authority of heads of Departments to employ counsel, and under it they employed district attorneys to examine titles and prepare abstracts thereof for submission to the Attorney-General, and allowed them special compensation therefor. But it was repealed by a clause in section 17 of the act of June 22, 1870, chapter 150, which is embodied in section 189, Revised Statutes. According to the construction given in practice, that repeal did not take away the right of a district attorney to compensation, where, acting under competent authority, he performs services of the character above mentioned, but it only altered the mode of his employment and payment; that is to say, it in effect invested

Compensation of District Attorneys.

the Attorney-General with sole authority thereafter to employ and fix the compensation of district attorneys where the performance of such services by them is called for.

Strongly confirmatory of the correctness of that view is the proviso in section 3 of the act of June 20, 1874, chapter 328. This section reads: "That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees." The word "payment," as here used, signifies to fix or determine the compensation for the services referred to; and the proviso is a virtual recognition of the practical construction given the act of 1870 (sec. 189, Rev. Stat.) above adverted to.

Upon the whole, I see no reason to differ from the views of my predecessors as to the right of district attorneys to special compensation for their service in examining titles, or as to the appropriations properly chargeable therewith. Expenses thus arising, including office fees for searches, copies of records, etc., being incidental to the purchase of the land, should ordinarily be paid out of the appropriation made for such purchase; and this, I understand, has been the general practice.

I am, therefore, of the opinion that you can lawfully pay the bills in question, to the extent that they have been approved by the Attorney-General, out of the appropriations for the acquisition of the property to which they respectively relate.

Very respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

American Surety Company of New York.—No Man's Land.

AMERICAN SURETY COMPANY OF NEW YORK.

The American Surety Company of New York has power, under the laws of New York, to assume the relation of surety upon a bond to the United States conditioned for the faithful performance of a contract to furnish steel gun forgings to the latter.

DEPARTMENT OF JUSTICE,

November 7, 1887.

SIR: In reply to your communication of the 31st October, ultimo, asking to know "whether the American Surety Company of New York is empowered to assume the relation of surety upon a bond to be given to the United States by the Bethlehem Iron Company of Pennsylvania, conditioned for the performance of a contract to furnish steel gun forgings to the United States, I have the honor to say that I am of opinion, after an examination of the laws of New York submitted to me in connection with your communication, that the American Surety Company of New York has the power to become a surety in the bond to be given by the Bethlehem Iron Company, such power being expressly given by the first section of the act of the legislature of New York of the 3d of June, 1885, entitled "An act to amend chapter four hundred and eighty-six of the laws of eighteen hundred and eighty-one, entitled 'An act to facilitate the giving of bonds required by law.'"

I have the honor to be, sir, your obedient servant,
A. H. GARLAND.

The SECRETARY OF THE NAVY.

NO MAN'S LAND.

The strip of territory known as "No Man's Land" not being within any existing judicial district, punishment of crime committed therein will not be within reach of the criminal law of the United States (see sixth article of amendments to the Constitution) until legislative action is had ascertaining the district which shall embrace such strip.

DEPARTMENT OF JUSTICE,

November 15, 1887.

SIR: I received your note of the 4th instant, relating to the administration of the criminal law in that part of the

No Man's Land.

public domain commonly called "No Man's Land." The land so designated is bounded on the north by the States of Kansas and Colorado, on the east by the Indian Territory, on the south by Texas, and on the west by New Mexico. Its length north and south is about 35 miles; its breadth east and west is about 165 miles. The title to it became vested in the United States by cession from the State of Texas, in accordance with the provisions of the act of Congress of the 9th day of September, 1850 (9 Stat., 446). By the same act a Territorial government is provided for the Territory of New Mexico. By the act of the 30th of May, 1854 (10 Stat., 277), the Territory of Kansas was organized. By an act of the 28th of February, 1861 (12 Stat., 172), a Territorial government was provided for Colorado. In the organization of these three Territories the land referred to was excluded from their several boundaries. In the establishment of the courts of the United States for the States of Texas, Kansas, and Colorado, and the Territory of New Mexico, the State and Territorial lines limit the judicial districts, except that the United States district court for Kansas and for the northern district of Texas, by the second and third sections of the act of the 6th of January, 1883 (22 Stat., 400), are extended over portions of the Indian Territory. The land referred to, then, is not embraced in any district established by law of the United States.

The sixth article of the amendments to the Constitution of the United States provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." * * *

It therefore appears that, without legislative action ascertaining the district within which this public strip shall be embraced, the punishment of crime therein is beyond the reach of the criminal law of the United States.

I am, very respectfully,

A. H. GARLAND.

The PRESIDENT.

Adjustment of Railroad Land Grants.

ADJUSTMENT OF RAILROAD LAND GRANTS.

The terms "bona fide purchasers of said unclaimed land," as used in the third proviso of section 3 of the act of March 3, 1887, chapter 376, mean those persons who, without knowledge of wrong or error, have purchased from the railroad company lands which had been previously entered by a pre-emption or homestead settler, where entry had been erroneously canceled as described in the first clause of that section, and which land the pre-emption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the second section of the act.

Patents, the issue whereof is provided for in the fourth section of the same act, are only intended to be issued after it shall have been legally determined, in the mode prescribed in the second section, that the certification or patent to the railroad company had been erroneously issued.

The word "grant," in the fifth section, should be construed to include (as it does in the preceding sections of the act) both the primary and the indemnity limits.

DEPARTMENT OF JUSTICE,
November 17, 1887.

SIR: By your letter of October —, 1887, you submit three questions for my opinion. They arise upon the construction of sections 3, 4, and 5 of the act of the 3d of March, 1887, which, as shown by its title, as a whole, was passed "to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes." (24 Stat., 556.)

The first section of the act directs the adjustment of the grants. The second section provides for the restoration of title to the United States where lands have been erroneously certified or patented to the railroads. The third section is, "That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant, or the withdrawal of publiclands from market, such settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public-land laws; *provided*, that he has not located another claim or made an entry in lieu of the one so erroneously canceled; and *provided also*, that he did not voluntarily abandon said original entry; and *provided further*, that if

Adjustment of Railroad Land Grants.

any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public-land laws, with priority of right given to bona fide purchasers of said unclaimed land, if any, and if there be no such purchasers, then to bona fide settlers residing thereon."

The question submitted under this section is:

"What class of purchasers is referred to by the expression 'bona fide purchasers of said unclaimed lands ?'"

Three classes of persons are provided for under this section:

First. Bona fide settlers whose homestead or pre-emption entries have been erroneously canceled on account of a railroad grant or withdrawal.

Second. Bona fide purchasers of such unclaimed lands.

Third. Bona fide settlers residing thereon.

The rights of the several classes to the lands referred to in the section are successive, in the order stated in the section. The first in right is the homestead or pre-emption settler whose entry has been wrongfully canceled. If he elects to assert his right, and has not been disqualified by locating another claim, or making another entry in lieu of the entry erroneously canceled, his right is absolute, and the successive rights of the remaining two classes can not attach if he lawfully asserts his claim. If he fails to claim the land, or is disqualified under the act, the rights of the second class of persons, who are the bona fide purchasers of the land unclaimed by him, attach and have precedence over those of the third class. The bona fide purchasers here referred to are those who, without knowledge of wrong or error, have purchased from the railroad company lands which had been previously entered by a pre-emption or homestead settler, whose entry had been erroneously canceled, as described in the first clause of the third section, and which land the pre-emption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the second section of the act.

The second question submitted by you is:

"Can the Department, after adjustment of the grant by the Department, issue a patent to the purchaser of such land

Adjustment of Railroad Land Grants.

before the said land has been reconveyed by the road or title recovered by judicial proceedings?"

This question, as shown by your letter, refers to patents whose issue is provided for in the fourth section of the act. The fourth section is a part of a general scheme for the disposition of lands which have been erroneously certified or patented to the railroads, which certification or patenting has been set aside and the title restored to the United States, as provided for in the second section. The language of the section "That as to all lands * * * which have been so erroneously certified or patented as aforesaid" in the fourth section refers to the same lands described in the second section as follows: "That if it shall appear * * * that lands have been from any cause heretofore erroneously certified or patented," etc.

The second section declares that the mode to finally determine whether the lands shall have been so erroneously certified or patented shall be by the admission of the company and re-conveyance, or, in case of dispute, by judicial proceeding. Until the land shall have been legally determined to belong to the United States the right to issue patents under the fourth section does not arise. If patents should issue under the fourth section before re-conveyance or judicial recovery under the second, and proceedings should then be instituted to cancel the patent issued to the railroad, in case of a decision adverse to the Government in the proceeding instituted two patents would be outstanding at the same time for the same land. The express words of the section with reference to the time when the patent shall issue are: "The person or persons so purchasing in good faith * * * shall be entitled to the land so purchased * * * after the grants, respectively, shall have been adjusted." As the adjustment, then, must be completed first, the patents under the fourth section are only intended to be issued after it shall have been legally determined in the mode prescribed in the second section that the certification or patent to the railroad had been erroneously issued.

The third question is as follows:

"Third. The fifth section of said act provides that where a railroad company has sold to citizens of the United States,

Adjustment of Railroad Land Grants.

or persons who have declared their intention to become such, lands not conveyed to or for the use of such company, the same being the numbered sections prescribed in its grant and coterminous with the constructed part of its road, and where such lands are for any reason excepted from the operations of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company, to make payment to the United States for said land, at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, or his heirs or assigns. The question submitted under this section is whether the provision last above quoted is confined in its application to lands within the primary granted limits, or whether it applies to lands within the indemnity limits of which the company has made selection, but which has not been approved to it."

The first section of the act, in the use of the word "grant," must have necessarily included both the primary and indemnity limits in the adjustment, as it was doubtless intended that the adjustment should be a full and final one. The lands which, under the adjustment, were found not to be the property of the railroad, were intended to be free from the cloud of claim by the railroad, and restored to the public domain for disposition according to law. The intent of the act shows that to carry out its purposes the word "grant" wherever used in the second, third, and fourth sections, must include the lands in both the primary and indemnity limits, as each directly, or by necessary implication, refers to the adjustment provided for in the first section.

The protection afforded and redress granted the settler by each of the sections is fully as important in the indemnity as in the primary limits. The limitation on further certification or patenting contained in the seventh section is fully as important as, and of more practical value, when applied to the indemnity limits, than to the primary limits of the grant. The fifth section is a part of the same scheme as the residue of the act. The wrong done the settler, who in good faith shall have purchased lands of the railroad company, to which the company by the adjustment is shown to have no legal right, is identical, whether the purchasers are in the

Adjustment of Railroad Land Grants.

indemnity or primary limits. The hardship he may be subjected to by loss of his land, improvements, and labor, is the same in either case. The whole scope of the law from the second to the sixth section inclusive is remedial. Its intent is to relieve from loss settlers and bona fide purchasers who, through the erroneous or wrongful disposition of the lands in the grants by the officers of the Government, or by the railroad, have lost their rights or acquired equities which in justice should be recognized. That the selection sold by the railroad company shall have been approved, is not required by the fifth section, nor that it shall have been patented. That the land shall have been approved to the company, before the purchasers shall be entitled to the benefit of the sixth section, is not required. By the words of the act, the only requisite established to entitle those wronged to its benefit, is that they shall be citizens of the United States, or shall have declared their intention to become citizens; that it shall have been sold to them by a railroad company as a part of its grant; that the land shall not have been conveyed to or for the use of the company; that the lands shall be of the numbered sections prescribed in the grant, and coterminous with constructed parts of the road, and that the purchasers shall have bought in good faith. It was not intended to limit the redress to cases in which the railroad could rightfully have sold the lands. The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had a just claim. The fifth section expressly refers to such lands as had been sold, which had not been conveyed "to or for the use of such companies." It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of the grant to another in good faith is the ground of his equity. In order that the remedy may be adequate to redress the wrong, the word "grant" in the fifth section must be construed to include, as it does in the preceding sections of the act, both primary and indemnity limits.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

South Boston Iron Works.

SOUTH BOSTON IRON WORKS.

Upon the statement of facts submitted: *Advised* that the right of the South Boston Iron Works to the possession and use of certain property (two lathes and a crane) belonging to the United States, derived under an agreement with the latter, dated January 21, 1885, has terminated, and that the right to the possession of the property is now in the United States exclusively.

DEPARTMENT OF JUSTICE,

November 18, 1887.

SIR: I have considered the question presented in your letter to me of the 26th of July last, as to whether "there is any right of possession in the South Boston Iron Works" to two lathes and a crane (used in the manufacture of guns) therein mentioned.

It appears by the papers submitted that on the 21st of January, 1885, the South Boston Iron Works entered into an agreement with the United States on the following terms:

"Whereas the South Boston Iron Works, a corporation organized under the laws of the Commonwealth of Massachusetts, doing business in the city of Boston and county of Suffolk, in said Commonwealth, being in possession of certain property belonging to the United of America, specified and described as follows:" (Here follows a description of the lathes and crane above referred to.)

"And whereas permission has been given by proper and competent authority that the said South Boston Iron Works shall continue in possession and have the use of the property hereinbefore described in the manufacture of certain guns for the United States under the terms and provisions of certain contracts between the said South Boston Iron Works and the United States, represented by Brig. Gen. S. V. Benét, Chief of Ordnance U. S. Army, existing and in force at this present date.

"It is agreed by the said South Boston Iron Works that it will relinquish possession of and deliver up to the United States, on demand made by such officer or agent as the Secretary of War shall designate for that purpose, the property hereinbefore referred to and described after the terms of said

South Boston Iron Works.

existing contracts shall have been fulfilled by the said South Boston Iron Works."

You state that "on the date of the execution of this agreement there were in existence between the United States and the South Boston Iron Works three contracts for the manufacture of materials and guns, which were entered into under the provisions of the act of Congress approved March 3, 1883 (22 Stat., 471), on the 24th of September, 1883, and the 30th of June, 1884. One of the contracts of the last named date, after having been extended to the extreme limit, was not completed until after the close of the fiscal year 1885-'86, when the appropriation therefor was no longer available; the other two, dated respectively September 24, 1883, and June 30, 1884, involving the construction of one 12-inch cast iron breech-loading rifle with wire-wrapped steel tube, although extended from time to time for a period of nearly two years, and until June 20, 1886, were never fulfilled, and the appropriation reverted to the Treasury on June 30, 1886, under the operation of section 3691, Revised Statutes."

I understand that the two contracts last above mentioned have not been fulfilled through the fault of the contractor, and are now regarded as no longer subsisting. The other contract, having been fulfilled, as it seems, is also determined.

Upon the foregoing state of facts I am of opinion that the right which was derived by the South Boston Iron Works, under the permission referred to in the aforesaid agreement of January 21, 1885, to the possession and use of the property in question, ceased on the termination of the three contracts as above.

The ownership of the property remaining in the United States, such right was simply that of a bailee, and the enjoyment thereof depended solely upon the purpose of the bailment and the time limited for its accomplishment, the latter being, by necessary implication, restricted to the duration of said contracts. On the failure of the bailee (the South Boston Iron Works) to accomplish that purpose within the time contemplated, the bailment terminated by its own limitation, and with it the bailee's right to possess and use the property. Agreeably to this view, the right to the pos-

Customs Laws.

session of the property now must be deemed to be in the United States alone.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CUSTOMS LAWS.

Coriander seed should be classified under paragraph No. 636, Tariff Index, as "seeds, aromatic, which are not edible," etc.

DEPARTMENT OF JUSTICE,

November 25, 1887.

SIR: Your letter of the 19th instant submits for my opinion whether coriander seed should be classed under Schedule N, 465, or in the free list under paragraph No. 636, Tariff Index.

No. 465 is: "Garden seeds, except seed of the sugar-beet, twenty per centum ad valorem."

Paragraph No. 636, so far as applicable, is: "Seeds, aromatic, which are not edible, and are in a crude state, free."

"Garden seeds," as used in the first paragraph cited, is a generic term, and as such might be construed to include almost all aromatic seeds; but this could not have been the construction intended by the legislature, for it would be substantially destructive of the second paragraph quoted. Even if coriander is a garden seed, if it is also aromatic and not edible it should be classed under paragraph No. 636. Your letter states it is aromatic, and that the seed itself is not edible, but is used on account of its aromatic qualities as a flavor for food products. The last fact stated is not of such a character as to have a preponderating weight over the fact that it is aromatic, and not edible. The almost sole value of the seed is derived from its aroma. The true construction of the two clauses, in my opinion, under the facts stated, requires that coriander seed should be classified under paragraph No. 636. I therefore recommend a modification of the classification to conform with this opinion.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

Union Pacific and Central Pacific Companies.**UNION PACIFIC AND CENTRAL PACIFIC COMPANIES.**

The question considered whether, on the facts presented, an action could be maintained by the United States against the Union Pacific Railroad Company, the Central Pacific Railroad Company, and the Western Union Telegraph Company, to recover back certain moneys paid for the transmission of Government dispatches over the bonded lines of said railroad companies.

DEPARTMENT OF JUSTICE,

November 30, 1887.

SIR: By your letter of the 23d instant you ask:

"Whether on the facts presented in the brief submitted by the Comptroller, and other papers therewith, an action could be maintained against the Western Union Telegraph Company and the Union Pacific and Central Pacific Railroad Companies to recover back the moneys paid to the Western Union Company for the services rendered over the bonded lines of the said railroad companies."

The Union Pacific Railroad Company and the Central Pacific Railroad Company, by accepting the benefits of the acts of 1862 and 1864, which called them into life, each, for a valuable consideration, obligated itself to construct and maintain a telegraph line along its route, and thereon at all times to transmit dispatches for the Government, and "that all compensation for such services rendered for the Government should be applied to the payment of the bonds and interest until the whole amount is fully paid."

The brief of the Comptroller states that \$12,495.42 have been paid for the transmittal of Government dispatches over the bonded lines of the Union Pacific Railroad Company, and \$5,665.24 for like dispatches over the bonded lines of the Central Pacific Railroad Company. This money has been paid by the Government, and has not been applied by the said companies as it was agreed it should be. The Government guaranteed the payment of the interest on the bonds referred to in the acts and has paid it, and has not been re-imburased by the companies. It has been damnified to the amount of the money not applied. The fact that the Government might have retained the money but did not exercise the right does not relieve the companies from the obligation of their contracts that it should be applied. The money, therefore, if it

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has not been paid into the Treasury, is owing from the companies severally to the Government. The statement of the Comptroller alleges the money was paid to the Western Union Telegraph Company; but, in connection with this statement, sets forth a summary of the contracts between the railroad companies and the telegraph company, in pursuance of which the payments of the moneys is claimed to have been made to the telegraph company. These contracts are unlike in their terms and require a separate consideration.

By the contract between the Central Pacific Railroad Company and the Western Union Telegraph Company, "The Central Pacific Railroad Company agreed to transmit all the telegraphic business of the Western Union Company at each railroad station where one agent shall be competent to perform all the duties of railroad agent and telegraph operator, and if an assistant operator should be required at any time it should be furnished by the Western Union Company." In consideration of this covenant, the Western Union Company agreed to furnish certain material, books, and employés, over which the railroad company was to furnish a superintendent. The Western Union Company agreed, as a part of the consideration, to pay the railroad company \$80,000 for the first year; \$85,000 for the second year; \$90,000 for the third year, and \$100,000 for each year thereafter during the continuance of the agreement. Under this contract, dispatches delivered at the offices on the bonded lines of the railroad company would be delivered to the agents of the railroad company. The money received by these agents will be received by the railroad company. If the agents diverted it, and paid it to the Western Union Telegraph Company, if the Western Union Telegraph Company knew of such diversion, it might be made responsible, on the principle that a trust fund may be followed in the hands of any one who receives it with knowledge of the trust. (*National Bank v. Insurance Company*, 104 U. S. R., 54.) But no sufficient facts are stated in yours to warrant the conclusion that the telegraph company received the money or knew of a wrongful diversion of the fund. If this fact can be established it might be liable.

As to such moneys as were received by the Western Union

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Telegraph Company at points of the bonded lines of the railroad company for the dispatches which were to be transmitted in part over the railroad company's bonded lines, it was the duty of the agents of the railroad company to collect from the telegraph company the pro rata compensation for such dispatches; but the failure of the railroad company to do so would not justify an action by the Government against the Western Union Company for the money thus received. It would be a matter of account between the railroad company and the telegraph company in which the Government should not be involved.

As to the Central Pacific Railroad Company, the action may be sustained against it for the money stated in the brief of the Comptroller to be owing by that company, if it has not been paid or applied; but in the absence of evidence that the money was paid to any others than agents on the bonded lines of the railroad company, no sufficient facts are set forth to justify joint action against the railroad and telegraph companies as to that money.

The contract between the Union Pacific Railroad Company and the Western Union Telegraph Company is of a different character. It provides that the lines of the railroad company shall form a part of the general system of the Western Union Telegraph Company; that the Government messages shall be transmitted at rates to be fixed by the railroad company on the railroad company's lines, with the proviso "that the local receipts of the railway company on such dispatches should be divided between the parties in the same manner as are provided in the tenth clause of the agreement." The provisions of this contract for a division of the profits and expenses impress upon it the characteristics of a partnership. The contract further declares that it is made "for the purpose of providing telegraphic facilities for the parties hereto, and for maintaining and operating the lines of telegraph along the railway company's railroads in the most economical manner, in the interest of both parties, and for the purpose of fulfilling the obligations of the railway company to the Government of the United States, and the public, in respect to the telegraphic service required by the act of Congress of July 1, 1862, and the amendments thereto."

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This shows that at the making of the agreement the parties to it had in view the act of 1862, and the obligation that the railroad company was bound to apply the compensation for Government dispatches as provided in that act. The obligation to apply is substantially an assignment in advance of such compensation for the uses provided in the act, and would impress upon the fund the character of a trust. That trust was, among other things, for the payment of the interest on the bonds. That interest has been paid by the Government. The Government has a right to follow that fund into the hands of any one who has received it with knowledge of the trust (104 U. S. R., *supra*). For this fund, then, the United States can sustain an action against the Union Pacific Railroad Company, if it has not been paid to or retained by the Government. It may also be followed into the hands of the Western Union Telegraph Company and the railroad company, who, by their joint agents, received it.

It must be remembered that the views expressed in this opinion are based upon the facts stated by the Comptroller, between whom and the other parties in interest there is a disagreement of fact, which is not in my province to decide.

The papers with yours transmitted are herewith returned.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

PURCHASE OF LAND.

The appropriation made by the act of March 3, 1887, chapter 362, "for the erection of monuments or memorial tablets for the purpose of marking the position of each of the commands of the regular army engaged at Gettysburg," is not applicable to the purchase of land for the sites of such monuments or tablets.

DEPARTMENT OF JUSTICE,

December 2, 1887.

SIR: With your letter of the 21st of November, 1887, you transmitted a letter received by you from Col. John M. Wilson "relative to the erection of monuments or tablets to mark the position of commands of the regular army engaged at

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Gettysburg, for which purpose \$15,000 was appropriated by the sundry civil bill of March 3, 1887," and asking my opinion "as to whether land for the sites of such monuments or tablets can legally be purchased out of said appropriation."

Section 3736 of the Revised Statutes declares: "No land shall be purchased on account of the United States except under a law authorizing such purchase."

When the actual dominion and ownership of the land is the direct purpose of the expenditure of the money of the Government, no such expenditure can be made, according to the language of the section quoted, unless under a law authorizing the purchase. The appropriation referred to in your letter is as follows:

"Monuments or tablets at Gettysburg: For the erection of monuments or memorial tablets for the purpose of marking the position of each of the commands of the regular army engaged at Gettysburg, fifteen thousand dollars, to be expended under the direction of the Secretary of War." (24 Stat., 535.)

The appropriation is specifically for the erection of monuments or memorial tablets. There is no express authority in the law to purchase land. The specific language, that the money is for the erection of monuments or tablets, applies it to that use, and rebuts the implication that it may be applied to any other purpose. The appropriation under consideration is found in the sundry civil bill. In the same act, ten different appropriations are made for the erection of structures, and a much larger number for the continuance or completion of buildings already commenced. In the former, where the site is to be purchased before the erection can be commenced, the appropriation specifically provides for the purchase of the site. When the legislature thus, in the same act, makes the distinction by recognizing that the appropriation for an erection does not, by implication, embrace the purchase of the site, it would be an unwarranted construction of a later clause in the same act to imply that which so much care had been taken to express in like cases in previous clauses of the same enactment. In an opinion rendered by Attorney-General Mason on the 18th of September, 1846 (4 Opin., 533), on a strictly analogous question, the conclusion

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was reached that an appropriation could not be extended for the purchase of land for the improvements provided for in the appropriation, although the fact appeared from the estimates that the purchase of the land entered into and formed a part of the estimate on which the appropriation was made, and the appropriation was for the full amount of the estimate. I therefore answer the question submitted by you in the negative.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

NOTARY PUBLIC.

A notary public appointed for the District of Columbia has no power to take acknowledgments of deeds in foreign countries (where he may at the time be) for property situated in said District.

DEPARTMENT OF JUSTICE,
December 3, 1887.

SIR: By your letter of November 26, 1887, you ask my opinion "As to whether a notary public appointed by the President of the United States for the District of Columbia has power, under the acts of Congress relative to his office, to take, in foreign countries where he may at the time be, acknowledgments of deeds for property in the District of Columbia."

By the act of Congress of the 7th of June, 1878 (Supp. Rev. Stat. 337), the President is authorized to appoint for the District of Columbia such notaries public, residents of the District, as the business of the District may require. The taking of acknowledgments of deeds is a judicial act. The office is local. When the officer goes to a foreign country, being outside of the limits for which he is appointed, he is not there a notary public, but a private citizen. His powers are confined to the locality for which he is commissioned, unless, by exceptional legislation, his official functions are extended beyond the locality for which he is appointed. Section 442 of the Revised Statutes relating to the District of Columbia prescribes a form for certificates of acknowledgment of deeds

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for lands in the district. That certificate requires the officer to certify that he is an officer in and for the district where the venue of the acknowledgment is laid, and that the person by whom the deed is acknowledged appeared before him in that district and acknowledged the deed. The law conclusively intends that the officer who signs the certificate shall only certify to the truth. If a notary public for the District of Columbia, at any place outside the District, should certify that he is an officer in and for that place his certificate would be false. The notary, therefore, as he can not in a foreign country truthfully certify according to the statutory form, can not there take an acknowledgment. The notaries public referred to in section 444 of the Revised Statutes for the District of Columbia, before whom deeds made in foreign countries may be acknowledged, are foreign notaries for the country in which the acknowledgment is taken. This is shown by the fact that the official character is required to be certified to, in conformity to section 443, which requires the attestation of the official character of the officer who takes the acknowledgment, and applies only to such officers as may be foreign to the District. I find no authority given by the law to notaries public for the District of Columbia to take acknowledgments in foreign countries for deeds to lands in the District. I therefore answer the question asked by you in the negative.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

FORT BROWN MILITARY RESERVATION.

The deed of conveyance to the United States from James Stillman and Thomas Carson, administrator, etc., dated October 14, 1887, which is offered for the acceptance of the Government (together with the quitclaim deed of S. Josephine Allen, dated October 24, 1887, the quitclaim deed of Francis J. Hale *et al.*, dated November 15, 1887, the quitclaim deed of William H. Hale, dated December 3, 1887, and the quitclaim deed of Thomas Carson, dated December 12, 1887, mentioned in the opinion), are sufficient to pass a valid title to the tract of land known

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as the Fort Brown military reservation in Texas, and to extinguish all claims for the use and occupancy of said reservation by the United States.

DEPARTMENT OF JUSTICE,
December 22, 1887.

SIR: I herewith return all the papers which were transmitted to me by your Department under cover of letters dated the 1st and 4th of October, 1887, relating to the proposed transfer to the United States of title to the tract of land (said to contain about 358 acres) known as the Fort Brown military reservation, situated in Cameron County, Tex. Accompanying them are also some additional papers, since filed in this Department, which relate to the same matter.

Among the papers first above referred to is a deed dated September 17, 1887, executed by James Stillman, of New York, and Thomas Carson, of Brownsville, Tex., administrator with the will annexed of Maria Josefa Cavazos, deceased, granting to the United States the whole of said tract; and in one of the aforesaid letters request is made for an opinion as to whether such deed is sufficient to vest the title to the premises in the United States.

I had occasion to consider the title to this property in two opinions heretofore addressed to you dated respectively, January 16, 1886, and May 20, 1886. The result there arrived at was, that a part of the premises (which is used for a national cemetery), containing about 25 acres, already belonged to the United States, the same having been acquired by condemnation proceedings instituted in 1872 under the act of Congress of February 22, 1867, chapter 61, and that to acquire a valid title to the remainder of the premises by voluntary transfer, deeds from a number of persons mentioned, including both the grantors in the aforesaid deed, would be necessary, in view of the existence of adverse claims of ownership by them involving disputed questions of fact which could not be satisfactorily determined without a judicial investigation.

Subsequently all these persons became parties to a suit in trespass to try title, etc., which was originally instituted in the district court for Cameron County, Tex., in June, 1886,

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by the heirs of Miguel Salinas against William L. Kellogg, an officer of the army then on duty at Fort Brown as post commander, and which was afterwards, on application of the United States attorney for the western district of Texas (who appeared for said Kellogg, under instructions from this Department) removed into the United States circuit court for said District, where such of the persons above referred to as were not plaintiffs were brought into the suit as defendants; and a trial was had in the latter court in July, 1887.

The record of the proceedings therein shows that the cause was heard upon pleas in reconvention filed by the different defendants; that the jury found in favor of two of the latter, namely, the said James Stillman and the said Thomas Carson, administrator, etc., of Maria Josefa Cavazos, deceased, for the property claimed by their pleas in reconvention, in the proportion of one undivided half of the premises to each, and that the court thereupon adjudged that they recover the premises in equal moieties, together with the rents and dues for the past use and occupation thereof.

It is understood that all the parties to the suit acquiesce in this judgment; so that the controversy over the ownership of the premises and the right to the issues and profits thereof, previously existing between them, may now be regarded as judicially determined in favor of the grantors in the deed in question, and their title fully established as against the other litigants.

But a cloud upon this title recently appeared, which was not cleared away by that judgment, it being a claim in behalf of persons who were not parties to said suit. In the latter part of June, 1886, a certified copy of a deed from Rafael Garcia Cavazos and Maria Josefa Cavazos, his wife, to Ebenezer Allen and William G. Hale, dated December 12, 1849, but not recorded until April 7, 1886, was transmitted to the Secretary of War, who subsequently sent it to this Department. By this deed an undivided one-tenth interest in certain land, including the premises (to all of which the said Maria Josefa Cavazos, under whom the said Stillman and Carson afterwards derived their title, then claimed the exclusive ownership) is granted to the said Allen and Hale.

It appears that both the grantees are dead, and that the

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entire interest of Allen in the premises has devolved, by testamentary disposition, upon his widow, Mrs. S. Josephine Allen, while the entire interest of Hale therein has passed, by inheritance, to his six surviving children, viz, William H., Francis J., Susan B., Louisa H., Alice S., and Richard K. Hale. To remove the cloud above adverted to, deeds from Mrs. Allen and the Hale heirs have been obtained as follows: (1) A deed from S. Josephine Allen by her attorney in fact, Thomas Carson, to the United States, dated October 24, 1887, granting the premises, and releasing and discharging the United States from all claims and demands whatsoever for or in respect of the use and occupancy thereof. (See deed accompanied by power of attorney herewith marked A and B.) (2) A similar deed from Francis J., Susan B., Louisa H., Alice S., and Richard K. Hale, to the United States, dated November 15, 1887. (See deed herewith marked C.) (3) A similar deed from William H. Hale to Thomas Carson and James Stillman, dated December 3, 1887. (See deed herewith marked D.) This instrument was recorded in Cameron County, Texas, December 6, 1887. In addition to these deeds, a similar one has been executed by Thomas Carson in favor of the United States, dated December 12, 1887 (see deed marked E), the object of which is to convey to the Government such interest in the premises as he may have acquired in his own right under the said deed of William H. Hale. The interest which James Stillman may have acquired under the same deed will pass on delivery of the deed made by him jointly with said Carson as administrator, etc. In my judgment, the deeds of the Hale heirs, together with that of Mrs. Allen, and also the deed of Carson, mentioned above, are sufficient to remove the cloud hereinbefore referred to.

As the deed of James Stillman and Thomas Carson, administrator, etc., dated September 17, 1887, which accompanied your request for an opinion, only purports to convey the property described therein, and contains no release of claims for use and occupation, it does not fully meet the requirements of the act of March 3, 1885, chap. 360, in regard to such claims.

The attention of the grantors being called to this, they have executed a new deed, dated October 14, 1887, conveying

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the same property to the United States and also "releasing and discharging the latter from all claims and demands whatsoever for the use and occupancy thereof." (See deed herewith marked A A.) This deed is offered by them in lien of the other. I may here add, that by an order of the county court of Cameron County, made at its August term, 1885, Thomas Carson as administrator, etc., was authorized for and in behalf of the estate of said Maria Josefa Cavazos, deceased, to unite with the other claimants to said Fort Brown reservation in a sale of the land, embraced in said Fort Brown reservation, to the United States, and to make, execute, and deliver to the said United States full and complete acquittances, releases, and conveyances of all and singular, the right, title, and estate which he, the said Thomas Carson, now has and holds as administrator of the estate of Maria Josefa Cavazos, deceased, in and to the land embraced within said Fort Brown reservation, and in and to all sums of money due by the United States as rents for the use and occupancy of the same."

Upon the whole, I am of the opinion that the aforesaid deed of James Stillman and Thomas Carson, administrator, etc., dated October 14, 1887, together with the said deeds of Mrs. Allen, the Hale heirs, and Thomas Carson, dated respectively October 24, November 15, and December 12, 1887, is sufficient to vest in the United States a good and valid title to the tract of land known as the Fort Brown reservation, in Texas (excluding, of course, that part of the premises which already belongs to the Government, whereof mention is hereinbefore made), and also to extinguish all claims for the use and occupancy of said reservation by the United States.

This opinion assumes that the premises are now free from tax or other liens. Should the proposed transfer take place, it is advised that proper searches therefor be made before the purchase money is paid over; the above-mentioned deeds and power of attorney (marked A, B, C, E, and A A) being in the mean time put on record.

In connection with the above matter several communications were received from you, dated October 15, 1887, and November 3, 4, 5, and 7, 1887, inclosing and calling my atten-

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tion to a number of letters addressed to you by Mr. Pedro G. Cavazos, also a copy of a letter addressed to you by the Mexican minister, and a letter addressed to you by William Brady, esq., of New York. Upon examination of these letters, however, I do not find that they in any manner affect the validity of the title to the property proposed to be conveyed.

Mr. Cavazos was a party defendant in said suit, and put in a plea in reconvention, claiming title to an undivided one-half of the premises, etc., as executor and trustee under the will of his mother Maria Josefa Cavazos, deceased. This claim was antagonized by the claim of Thomas Carson as administrator, with the will annexed, of the estate of the said Maria Josefa Cavazos, which was also pleaded in reconvention. The verdict and judgment went against the former, and in favor of the latter claimant. The only interest which Mr. Cavazos has is that of a distributee, in common with the other heirs of said Maria Josefa Cavazos, of the proceeds arising from the sale of the land and of the receipts for use and occupancy thereof; and it is not to be doubted that both his and their rights will be adequately protected by the local court having jurisdiction of the administration and distribution of the said estate. This remark is applicable to the letter of the Mexican minister, which is in relation to the interests of the same heirs. The letter of Mr. Brady relates to a claim for his services as attorney for James Stillman and others, owners of the property aforesaid, and does not concern the title thereto. A notice of such claim was also received here (which I transmit herewith), wherein the claimant asserts a lien upon the fund appropriated for the purchase. There is no foundation for the lien asserted, nor has the claimant, as I conceive, any equitable interest in the fund which your Department is bound to protect in the disbursement thereof.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

Northern Pacific Land Grant.

NORTHERN PACIFIC LAND GRANT.

The joint resolution of May 31, 1870 (16 Stat., 378), added a second indemnity belt to the land grant made to the Northern Pacific Railroad Company by the act of July 2, 1864, chapter 217, such grant thus having two indemnity belts.

Indemnity selections within the *first* belt (*i. e.*, that originally created by the act of 1864) are not restricted to the limits of the particular State or Territory in which the granted lands were lost, but may be made outside of those limits.

DEPARTMENT OF JUSTICE,

January 17, 1888.

SIR: Your predecessor, by his letter of the 7th of December, 1887, asked my opinion on the following points:

(1) "Did the joint resolution of May 31, 1870, create a second indemnity belt beyond and in addition to the indemnity belt created by the granting act of 1864?"

(2) "If you answer the first proposition in the affirmative, and find that there are two indemnity belts, can selections be made within the first belt for losses outside the particular State or Territory in which the same occurred?"

The granting act referred to in your first inquiry was passed on the 2d day of July, 1864 (13 Stats., 365). Its third section granted to the Northern Pacific Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the *amount* of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior,

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in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

This section thus provided for a limit or boundary on each side of the road, to run parallel to the course of its line, along the outside lines of the alternate sections granted, and another limit or boundary 10 miles *beyond* that, to which last limit the company was granted the right to select for lands lost in the first in consequence of prior rights having attached thereto. These limits have been known as the "primary" and "secondary," or the "granted" and "indemnity" limits. Both are clearly the boundaries of rights or privileges granted by the section. On the 6th of March, 1865, the president of the company presented a map of the general route of the line to the proper-officers of the Interior Department, and asked a withdrawal from sale of the public lands along its course. This map was adjudged insufficient and withdrawal refused. The map thus filed accomplished no good purpose for the company, but afforded the public a general knowledge of the probable location of the prospective road. The knowledge thus furnished inspired activity in the settlement, pre-emption, and purchase of lands along the probable line indicated by it. The nineteenth section of the act declared the act should be null and void unless \$2,000,000 of the stock of the company should be taken and 10 per cent. thereof paid in within two years. Other provisions of the act showed the intent of Congress to impose on the company a speedy completion of the line. Before the 31st of May, 1870, the date of the resolution referred to in your inquiry, little had been done by the company to comply with that intent. The necessity for relief from the effect of the supineness of the company, and its inability to proceed successfully without additional powers, gave rise to the resolution under consideration, which declares (16 Stats., 378):

"That the Northern Pacific Railroad Company be, and hereby is, authorized * * * to locate and construct, under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, * * * and in the event of there not being in any

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State or Territory, in which said main line or branch may be located at the time of the final location thereof, *the amount* of land per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, *in such State or Territory*, within ten miles on each side of said road *beyond the limits prescribed in said charter*, as will make up such deficiency on said main line or branch, except mineral or other lands, as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July 2, eighteen hundred and sixty-four."

The first clause in the resolution quoted expressly declares the company is authorized to construct "under the provisions and *with the privileges, grants, and duties* provided for in its act of incorporation." This language clearly indicates an intent to confirm all the benefits, privileges, and grants embraced in the original act, and rebuts any interpretation of the resolution which would diminish or curtail them. Among those privileges was the right of the company to select lieu lands for those that had been disposed of by the United States at any time prior to the date of the definite location of the road. If this indemnity grant be construed to cover the same ground embraced in the original indemnity limit, and not extend *beyond* it, it would deprive the company of the lieu lands for any lands that had been taken up by settlers or purchasers before the passage of the act of 1864. Congress could not have intended to provide for indemnity of lands lost to the company after the passage of the act of 1864, and take from it all indemnity for those which had been lost before that date, in an enactment whose clear purpose was to increase the inducements to build the road by strengthening the credit of the company. The probability that many of the most valuable lands which the company would have received had the lands been withdrawn on the 6th of March, 1865, within the original primary and secondary limits, had been appropriated

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by settlers and purchasers between the passage of the original act and the resolution of the 31st of March, 1870, suggested the necessity that an additional indemnity limit should be established for lands which had been lost between those dates. This probable necessity was provided for by the provision in the resolution that—

“In the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof the amount of lands per mile granted by Congress to said company within the *limits* prescribed by its charter, then the said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, *beyond the limits prescribed in said charter*, as will make up such deficiency.”

This clause seems to be sufficiently clear to be its own interpreter. “Beyond the limits prescribed in said charter” certainly means outside of the limits. It does not declare it is to be outside of the granted or primary limits only, but beyond the limits, without restriction to either primary or secondary. Interpretation does not authorize the interpolation of the words “primary” or “granted” into the statute. To add the words “granted” or “primary” after the word “limits” would diminish the right of indemnity by excluding the company from indemnity for such lands as prior to the passage of the original act had been disposed of by the Government, and would restrict the right of selection for lands lost to the particular State or Territory in which the lands lost were located. The company would thus be deprived of a part of the “privileges and grants provided for in its act of incorporation.” That the resolution should not be thus restricted is corroborated by the uniform interpretation of both the Land Bureau and the Department of the Interior in their administration of it. Commissioner Drummond, on the 26th of December, 1871, issued orders to the registers and receivers along the line of the road as follows:

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"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,

"Washington, D. C., December 26, 1871.

"GENTLEMEN: Referring to my letter to you of the 15th of September, 1870, and map of designated line and 20-mile limit of the land grant to the Northern Pacific Railroad Company and directing a withdrawal of lands therefor, I now inclose you a map showing the line of the road as constructed, together with the definite 20-mile limits of the grant and the additional 10-mile indemnity limits as granted under the original act of July 2, 1864, and also the additional 10-mile indemnity limit granted by the joint resolution May 31, 1870. These limits are respectively designated as the 20, 30, and 40 mile limits. I have also designated the limits fixed in my letter of the 15th of September, 1870; and you are now directed to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections within the limits designated on the map herewith and not heretofore withdrawn. * * *

"Respectfully submitted.

"WILLIS DRUMMOND,

"Commissioner."

REGISTER AND RECEIVER,
Alexandria, Minn.:

On the 31st of July, 1885, Commissioner Sparks, in the case of the *United States v. Guilford Miller* (3 Brainerd's Precedents, 214) referring to this resolution, together with the indemnity provisions of the original act, uses the following language:

"The indemnity provision is as follows:

"And whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by such company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

"The act of May 31, 1870 (16 Stat., 276), extended these limits farther, in the event that deficiencies could not be supplied within the first 10 miles within the granted limits."

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The interpretation thus illustrated has been the rule of administration both in the Land Bureau and in the Interior Department without exception ever since the passage of the resolution of 1870. Many property rights must doubtless have vested upon the construction adopted. Contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in case of doubt ought to turn the scale. (*Brown v. United States*, 113 U. S., 570). As, therefore, the circumstances surrounding the passage of the resolution of 1870, the language of the resolution itself, and the contemporaneous and uniform interpretation adopted by the Land Bureau and Interior Department all concur in the conclusion that the resolution of 1870 "creates a second indemnity belt beyond and in addition to the indemnity belt created by the granting act of 1864," your first inquiry is answered in the affirmative.

In reply to your second inquiry, the first section of the act of the 2d of July, 1864 (13 Stat., 366), declares :

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy *a continuous railroad and telegraph line*, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound."

By this a continuous line is provided for. No State or Territory is even named in it, except as the starting point and terminus of that line. State and Territorial lines are not mentioned nor in any way recognized as constituting divisions which break the continuity. On this unbroken line alternate sections are granted to the amount of ten per mile on each side within the States and twenty within the Territories. Whenever lands shall have been lost to the company from the amount granted within the primary limits by previous settlement or purchase the act declares :

"Other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not

Northern Pacific Land Grant.

more than ten miles beyond the limits of said alternate sections." (13 Stats., 368.)

This clause as a whole provides for an indemnity for lands lost out of the amount granted. The conditions of this indemnity, set forth in detail, under which the right or privilege of selection vests in the company, are: lands shall have been lost out of the amount granted; selections must be made by the company of other lands in lieu of them; those selections must be made under the directions of the Secretary of the Interior; selections shall only be of alternate odd-numbered sections, and they must not be more than 10 miles beyond the limits of the granted sections. These are all the limitations or conditions provided for by the act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding of another limitation that the lieu lands must be selected in the same State or Territory in which the lands were lost. To annex such an additional limitation to the words of the grant would be legislation and not construction. In the resolution of the 31st of May, 1870 (16 Stat., 379), in which Congress intended to limit the selection of the lieu lands to the same State or Territory in which the lands were lost, the language used to so limit the grant is:

"Then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, *in such State or Territory*, within ten miles on each side of said road, beyond the limits prescribed in said charter."

The language, "in such State or Territory," or some equivalent language, would doubtless have been found in the original act of 1864, had it been the intent of Congress to limit the selection to the State or Territory in which the lands were lost. In the absence of any such words, I do not feel authorized to interpolate them as an additional limitation to the law as enacted.

I therefore answer your second inquiry also in the affirmative.

I am, yours, respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

Purchase of Indian Supplies.

PURCHASE OF INDIAN SUPPLIES.

The third section of the act of March 2, 1887, chap. 320, permits purchases not exceeding \$3,000 in amount to be made in open market without advertisement, in the discretion of the Secretary of the Interior, as often as a "case of exigency" exists, so that the gross purchases keep within the sum appropriated.

DEPARTMENT OF JUSTICE,

January 27, 1888.

SIR: Your inquiry of the 19th instant is whether the aggregate expenditure from the appropriation for Indian supplies (sec. 3, 24 Stat., 46 i) is limited to a sum not exceeding \$3,000 for the annual total expenditures, or for a single expenditure at any one time, in cases of exigency.

Section three authorizes purchases out of the appropriation for Indian supplies in an aggregate of \$500 in value at any one time; and when cases of exigency exist purchases may be made in the discretion of the Secretary of the Interior in open market in amount not exceeding \$3,000; the latter purchases, in sums not exceeding \$3,000, are restricted by official record of facts constituting the exigencies and by a report thereof to Congress.

The prevailing words of the section are: "That no purchase of supplies for which appropriations are herein made, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in cases of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars. * * *

The above interpretation assumes that section 3 does not appropriate money, but is a proviso explaining how the appropriation may be used. Under this rule of interpretation the whole section must be read together, and the parts must interpret each other, so that the intention of the legislature may be ascertained.

Congressional Library Building.

In the first part there is a prohibition, in the second part an exception. Both deal with one subject matter; the prohibition, with sums over \$500; the exception, with sums under \$3,000. The phrase "at any one time" in the former has a continuing and pertinent force in the latter clause; a conclusion that is strengthened by the words "except in cases of exigency," which imply a plurality of exigencies, when purchases under \$3,000 may be made. Construed together, then, the exception permits as many purchases of \$3,000 as the prohibition permits of \$500, so that the gross purchases keep within the sum appropriated.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CONGRESSIONAL LIBRARY BUILDING.

The words "proper advertisements," as used in the act of April 15, 1886, chap. 50, mean advertisements for proposals in such cases as the general provisions of law concerning public contracts require.

The Commission created by that act may, in the construction of the Congressional Library Building, contract for personal services without previous advertisement; and within that description of services come those rendered by mechanics and laborers who may be employed to place the stone properly in the wall directly under the control and supervision of the Commission, its architect, or superintendent of construction.

DEPARTMENT OF JUSTICE,

February 21, 1888.

SIR: In your letter to me of the 17th inst., at the request of the Commission created by the act of April 15, 1886, entitled "An act authorizing the construction of a building for the accommodation of the Congressional Library," you inquire:

"Whether, under said act or other existing statutes, the Commission is authorized to contract, after proper advertisement and the reception of bids, for the necessary stone, cement, lime, sand, and other materials required for the construction of the foundation walls of the Library Building, and then to employ the necessary mechanics, by the day, to place

Congressional Library Building.

the stone properly in the wall, directly under the control and supervision of the Commission, its architect, or superintendent of construction, or whether it is obligatory upon the Commission to contract for such labor only after advertisement and reception of bids, either in connection with the furnishing of materials or separately."

Having carefully considered this inquiry, I have now the honor to submit the following in reply:

The act of 1886, mentioned above, authorizes the said Commission to make contracts for the construction of the Library Building "after proper advertisements and the reception of bids." The words "proper advertisements," as there used, I think, mean nothing more than advertisements for proposals *in such cases as the general provisions of law concerning public contracts require.* To ascertain, then, wherein it is or is not incumbent upon the Commission to advertise for proposals previous to making contracts, recourse must be had to these provisions, which are contained in section 3709, Revised Statutes. See also in connection therewith section 238 of the Revision relating to the District of Columbia.

By the former section all "contracts for supplies or services in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same," etc., while by the latter section "all contracts for buildings and other public works of the United States in the District of Columbia shall be advertised at least sixty days before letting."

It will be observed that section 3709 expressly excepts contracts for "personal services" from the requirement of previous advertisement for proposals. Section 238 prescribes the duration of the advertisement, where the proposed contract relates to public buildings or works in the District of Columbia, but does not otherwise modify section 3709.

The conclusion reached is that the Commission may, in the construction of the Library Building, contract for "personal services" without previous advertisement. And within that description of services would obviously come those rendered by mechanics and laborers who may be employed by the Commission "to place the stone properly in the wall

Tax on Notes Used for Circulation.

directly under the control and supervision of the Commission, its architect, or superintendent of construction."

I am, sir, very respectfully,

A. H. GARLAND.

Hon. WM. F. VILAS,

*Secretary of the Interior, and Chairman of the
Commission for the Construction of the Con-
gressional Library Building.*

TAX ON NOTES USED FOR CIRCULATION.

The tickets issued by certain ice companies (copies of which are given in the opinion) are not "notes" within the meaning of that term as used in section 19 of the act of February 8, 1875, chapter 36, and therefore are not subject to the 10 per centum tax imposed by that section.

Where a company or corporation made and paid out its own notes in the ordinary course of its business, not intending them to be used for circulation as money or currency, their use as such by other persons after they were paid out, without approval by the maker of such use, would not subject the maker to the tax.

No tax, as such, is imposed on those notes which are prohibited by section 3583, Revised Statutes. The violation of this section is vindicated by fine or imprisonment, or both.

DEPARTMENT OF JUSTICE,

February 23, 1888.

SIR: By your letter of the 28th of January, 1888, after referring to ice tickets issued by a number of ice companies upon the Hudson River, and submitting three specimen copies, you inquire,

First, "Are these so-called ice-tickets, or any of them, and if only some of them which, *notes* within the meaning, purpose, and intent of that word as employed in section 19 of the act of February 8, 1875 (18 Stat., 311)?"

Second, "Is a company or corporation relieved from tax on the amount of its own notes used for circulation by others, and paid out by it, provided it itself did not intend them for circulation and does not use them for circulation, except in so far as it is done by paying them out?"

Third, "Is the Government precluded from collecting from a corporation a tax on the corporation's own notes used for

TAX ON NOTES USED FOR CIRCULATION.

circulation and paid out by it by the fact that the notes fall within the prohibition of section 3583 of the Revised Statutes of the United States?"

Fourth, "Are these issues, or any of them, and if so what ones, taxable under said section 19 of the act of February 8?"

The three copies of ice tickets submitted are as follows:

Jolly Island.

Good for 12½ cents.

Knickerbocker Ice Company.

Robert Maclay, Prest.

Consumers' Ice Company.

\$1.50.

R. French, Prest.

New Jersey Ice Company.

West Camp.

Good for \$1.75.

No. 474. Henry L. Newkirk, Treas.

(Indorsed on back): "E. A. Stevens."

The law imposing the tax is the nineteenth section of the act of the 8th of February, 1875 (18 Stat., 311), which provides:

"That every person, firm, association, other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them."

This section imposes a tax on *notes*. It is, therefore, indispensable that the instrument taxed should be a note. The statute does not include every note given by a debtor to his creditor. In the case of *Hollister v. Mercantile Association* (111 U. S. R., 65) the notes taxable under the statutes are limited to negotiable promissory notes, in the following language:

"From this review of the legislation on the general subject, and the apparently studied use by Congress of words of appropriate signification whenever it was intended to cover anything else than promissory notes in the commercial sense of that term, we are led to the conclusion that only such notes as are in law negotiable, so as to carry title in their

TAX ON NOTES USED FOR CIRCULATION.

circulation from hand to hand, are the subjects of taxation under the statute."

Neither are all negotiable promissory notes taxable under the statute. One of the chief purposes of the tax is to restrain or repress the issuing of such notes as are intended to be subjected to the tax. Congress did not intend to clog the business of the country by repressing the giving of negotiable promissory notes, nor impose an additional indebtedness of 10 per cent. upon a debtor who, in the ordinary course of business, gives his creditor a promissory note for the amount he owes. The additional limitation of the taxable notes is found by considering the words of the enactment in connection with other existing legislation on the same subject, which may be found in sections 3583, 5182, 3408, 3412, and 3413 of the Revised Statutes. The words used, "for circulation and paid out by them," as found in the enactment, when construed in connection with like language and intent shown in other parts of the same system, establishes another limitation upon the taxable notes. The making and paying out of the note are the acts of the maker. The character of the note must be impressed upon it by him in those acts. If the maker, in the ordinary conduct of a lawful business (other than that of banking), for the purpose of that business gives his negotiable promissory note without intent that it shall be used as currency in competition with the national currency, such a note would not be taxable. If the maker did not intend the note to be used as a substitute for money, the fact that others, without consulting him, so used it, should not subject him to the tax; nor will the fact that those into whose hands the paper may come may assign or transfer it render him liable to a tax for which he would not have been liable when it left his hands in the ordinary course of a legitimate business. The subject matter of taxation, therefore, intended by the act is negotiable promissory notes paid out with the intent at the time of their issue that they shall be used as a currency or circulating medium.

In your letter you state you inclose "a sample of the tickets issued by each of five companies." I find but the three samples above set forth among the inclosures.

In reply to your first and fourth inquiries: None of those

Attachment of Imported Merchandise.

tickets are notes within the meaning, purport, and intent of that word as employed in section nineteen of the act of February 8, 1875.

In reply to your second inquiry: If the company or corporation made and paid out its own notes in the ordinary course of its business, and did not intend them to be used for circulation as money or currency, their use as such by other persons after they were paid out, without the approval by the corporation of such use, would not subject the maker to the tax, and the mere fact that the maker paid the ticket when presented would not be such an approval as would impose the liability.

In reply to your third inquiry: Section 3583 of the Revised Statutes absolutely prohibits the issuing of notes, intended for circulation as currency, of less denomination than \$1. The violation of this section is vindicated by fine or imprisonment, or both. It is not to be presumed Congress contemplated a general disregard of its own enactment, and imposed a tax, as such, for acts prohibited by it. This principle is recognized in the case of *McLain v. The United States* (6 Peters, 427). An examination of the existing statutes does not show that Congress intended to impose a tax on that which by law was forbidden, and as to such notes as are prohibited by section 3583 no tax as such is imposed.

I herewith return the inclosures, as requested.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

ATTACHMENT OF IMPORTED MERCHANDISE.

Imported merchandise, while in the custody of the customs officers, is not subject to attachment at the suit of private parties; and those officers should pay no attention to process of that kind against such merchandise when served on them.

DEPARTMENT OF JUSTICE,

February 24, 1888.

SIR: I received your letter of the 9th of February, 1888, inclosing copies of three monitions issued from the district court of the United States for the southern district of New

Attachment of Imported Merchandise.

York, and served by the marshal on the collector of customs of the port of New York. You ask, "Whether or not customs officers should pay any attention to these pretended attachments of imported merchandise in the custody of the United States."

The motions command the marshal "to attach the said merchandise, and detain the same in his custody until the further order of the court respecting the same." The customs laws command the officers of the customs to take possession of merchandise imported by virtue of the laws of the United States, and retain the goods in accordance with law until the duties (if subject to duty) shall be paid. The lien of the United States, and the right to the possession of the goods for its enforcement, have precedence over every other lien and right. When the collector of customs, in the discharge of his official duty in obedience to law, takes possession of merchandise, his possession is the possession of the United States. Until the right of the United States to the possession shall have terminated, the marshal can not lawfully seize the goods, or interfere with the possession of the officers of the customs. The collector can not recognize or hold a concurrent possession with the marshal. The law is declared as follows in the case of *Harris v. Dennie* (3 Peters, 304):

"From the moment of their arrival in port the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with or restricts or controls that custody is a virtual violation of the provisions of the act. Now, an attachment of such goods by a State officer presupposes a right to take possession and custody of those goods and to make such possession and custody exclusive. If the officer attaches upon mesne process, he has a right to hold possession to answer the exigency of that process; if he attaches on execution, he is bound to sell, or may sell, within a limited period, and thus virtually displace the custody of the United States. The act of Congress recognizes no such authority and admits of no such exercise of right."

This statement of the principle is quoted with approval

Iron-Bar Ends.

and enlarged upon in the case of *Taylor v. Carryl* (20 How., 596).

The law does not contemplate that the officers of the customs shall be involved in the litigation of private persons with reference to their debts against, or their rights in, merchandise imported; nor can they be required to hold the goods after the right of the United States shall have been discharged. In a single instance, section 2981 of the Revised Statutes permits the chief officer of customs to retain the goods for a purpose other than the enforcement of the public right. This exception in favor of private parties goes far by implication to forbid him to retain the import for any other purpose, not public, beyond the one excepted.

Your inquiry is therefore answered in the negative.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

IRON-BAR ENDS.

Advised that iron-bar ends, consisting of the crop ends, from 1 to 4 inches long, cut off from Swedish bar-iron in the process of manufacturing the bars, have not been "in actual use" so as to justify their classification as scrap-iron under Schedule "C" of the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
February 24, 1888.

SIR: Your letter of the 31st of January, 1888, submits for my opinion whether certain charcoal iron-bar ends, consisting of the crop ends from 1 to 4 inches long, cut off from Swedish bar-iron in the *process of manufacturing* the bars, "have been in actual use" so as to justify their classification as scrap-iron under Schedule C of the tariff act of 1883.

That which is a part of the process in the manufacture of an article is not an *actual use of the article*. The cutting off of the bar ends under the facts stated in your letter is a part of the process of manufacturing the bar-iron. They have not, therefore, been in actual use, as contemplated, to entitle them to be classified as scrap-iron under the definition of scrap-iron

Classification of Carriage-Robes.

contained in the statute, which is that "nothing shall be deemed scrap-iron or scrap-steel except waste or refuse iron or steel *that has been in actual use* and is fit only to be re-manufactured."

This view is not inconsistent with the ruling of the Supreme Court in the case of *Schlesinger v. Beard* (120 U. S. R., 267). In that case the cuttings and clippings were waste, cut off rods and plates which were used for the making of boilers and the erection of bridges. The clippings were cut so as to fit the rods and plates for that particular use. The court ruled that "The plates, rods, and beams were made to be used in a particular way. They have been so used, and these cuttings and clippings are the waste of that use. Consequently they are, in our opinion, wrought scrap iron, and dutiable as such."

The bar-iron referred to in yours is not of any particular use, but for the general market. No parts of the process of manufacture of it can be properly called "an actual use;" therefore the ends described in yours, cut off in the process of manufacture, should not be classified as scrap-iron.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CLASSIFICATION OF CARRIAGE-ROBES.

Advised that if certain lap-robés or carriage-robés, sometimes called railway or traveling rugs, were commercially known at the time of the passage of the act of March 3, 1883, chapter 121, as mats or rugs, they should be classified under a certain clause of Schedule K of that act, providing for "Carpets and carpetings of wool, etc., and mats, rugs," etc.; but that if not so known, nor by any other designation provided for, they should be classified according to the component material.

DEPARTMENT OF JUSTICE,

February 25, 1888.

SIR: I received your letter of the 17th of February, 1888, "relative to the classification under the tariff laws of certain lap-robés and carriage robes, which are sometimes called railway or traveling rugs," also a "copy of a decision rendered

Classification of Carriage-Robes.

by the Secretary of the Treasury on the 18th of January, 1870 (S., 543), on certain railway rugs, which are believed to be the same class of articles."

You state the importers claim the merchandise should be classified under the clause of Schedule K of the act of 1883 (22 Stat., 510), which provides:

"Carpets and carpetings of wool, flax, or cotton, or parts of either or other material, not otherwise herein specified, forty per centum ad valorem; and mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets or carpetings shall be subjected to the same rate of duty herein imposed on carpets or carpeting of like description; and the duty on all other mats, not exclusively of vegetable material, screens, hassocks, and rugs, shall be forty per centum ad valorem."

You ask for "an expression of my opinion under section 2 of the act of March 3, 1875, as to whether the decision (S., 543) referred to should be modified to accord with the claim of the importers." To answer the question unqualifiedly would involve the decision of a question of fact which is not within my province; but if it be assumed the goods were known commercially at the time of the passage of the act of 1883 as mats or rugs, they should be classified under the clause quoted in accordance with the views of the importer, because in that event they are specially provided for. If they were not known at the time of the passage of the act referred to in trade and commerce as mats or rugs, nor by any other commercial designation provided for, they should be classified according to the component material. The decision (Synopsis, No. 543) referred to should be modified to correspond with these views.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

Court Martial—Pardon.**COURT MARTIAL—PARDON.**

An officer who is authorized to order a general court-martial has no power under the 112th article of war to pardon or mitigate the punishment adjudged by it after confirmation by him of the sentence.

DEPARTMENT OF JUSTICE,

February 27, 1888.

SIR: The papers transmitted with your letter of the 24th of February, 1888, call for an interpretation of the one-hundredth and twelfth article of war (Rev. Stat., sec. 1342), which provides:

“Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial shall be held shall have power to pardon or mitigate any punishment which such court may adjudge.”

The question presented is whether an officer authorized to order a general court-martial, *after* the final approval by him of the punishment adjudged by the court, has power to pardon the offender.

The second section of Article II of the Constitution of the United States provides:

“The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

This grant of power to pardon offenses against the United States to the President alone forbids the exercise of it by any one else. The crimes or misdemeanors forbidden by the Articles of War are offenses against the United States. The Constitution, therefore, forbids any one but the President to pardon those who commit such offenses. If the power to pardon provided for in article 112 is an absolute grant of power to pardon an offense against the United States, vested in an officer authorized to order a general court-martial, the enactment as to such power is void. But it is to be presumed Congress passed the law in subservience to and not in violation of the Constitution. If, then, the enactment is

Court Martial—Pardon.

fairly capable of a construction that will render it consistent with the Constitution, that construction should be adopted as expressing the intent of the legislative power. To discover that intent, the context and subject-matter may be resorted to.

Article 109 provides: "All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court."

This establishes that the action is not final until the officer ordering the court shall confirm it. His confirmation is the judgment of the law. That confirmation is an act distinct from the action or judgment of the court, and is the action of the officer ordering the court after it shall have exhausted its jurisdiction over the alleged offense. Article 112 clearly recognizes the distinction between the final judgment of the law as pronounced by the officer who ordered the court and that of the court-martial submitted to him for judgment. The verdict of a jury bears a close analogy to the judgment of a court-martial. The sentence pronounced on that verdict by the court bears a like analogy to the confirmation of the officer who ordered the court.

The language of article 112 is:

"Every officer who is authorized to order a *general court-martial* shall have power to pardon or mitigate any punishment adjudged by it."

The pronoun "it" refers to "general court-martial" as its antecedent. It is only the judgment of a court-martial that the officer may pardon or mitigate. The enactment does not give him power to pardon or mitigate the punishment of an offense finally adjudged and confirmed by himself. Had Congress so intended, it had the free use of the whole English language to so say. To express such an intent, it would have added after the word "it" the words "or him," so that the enactment would have read "any punishment adjudged by *it or him*." A fair interpretation of the act does not require the addition of these words. For a construction of the article which shall give the officer any other power over the punishment, except the power to pardon or mitigate the punishment adjudged and reported to him by the court, adds to the power granted by the statute. Before he shall

Court Martial—Pardon.

have confirmed the action of the court article 112 permits him to mitigate the punishment or remit it; but after the final judgment of confirmation—which is the judgment of the law—shall have conclusively established the offense and the guilt of the offender, the law gives him power neither to mitigate nor remit. It is only the punishment, by the language of the article, and not the offense, that he may mitigate or remit. Until the final judgment the charge against the alleged offender is not conclusively or legally established as an offense, and until so established Congress intended to authorize the officer to suspend further prosecution of the alleged crime. But when the law has finally pronounced its judgment, it could not and did not intend to grant the power to pardon the offense against the United States.

Any other interpretation of the article would be a disregard of the constitutional limitation of the pardoning power, which is vested in the President alone. After the final sentence of the law is pronounced by the superior officer, the charge has passed conclusively into an offense beyond dispute, for, as is ruled in the case of *Ex parte Reed* (100 U. S. R., 13), *Keyes v. United States* (109 U. S. R., 336), and 11 Opin., 19, the judgment of a court-martial is conclusive in its effect as to the truth of the charge, and as a judicial decree is a bar to further proceeding.

It is declared in *Bronson v. Schulten* (104 U. S. R., 415): “It is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered; and this is placed upon the ground that the case has passed beyond the control of the court.”

Laws of the Choctaw Nation.

The consequences that might follow any other interpretation would be obnoxious to the constitutional principle that forbids any person to be twice put in jeopardy for the same offense; for the power of the officer to pardon is limited by the statute to the pardon of the punishment. After such a pardon the offense would still remain unpardoned against the offender. If the power of the officer to pardon existed at any time after the final judgment, and should be exercised after the offender had paid a large part of the penalty of the law, he might be again prosecuted, convicted, and twice punished for the same offense. Such a consequence was not intended.

The latter part of the opinion of Attorney-General Brewster, rendered February 11, 1884, which seems to be inconsistent herewith, does not appear to have been essential to the determination of the question submitted to him, and therefore may not have been maturely considered, nor intended as an authoritative answer to the question now under consideration.

In reply to your inquiry, therefore, after the final approval by the officer ordering the court-martial, he has no power to pardon the offense or mitigate the punishment under article 112.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

LAWS OF THE CHOCTAW NATION.

The seventh section of the Choctaw intermarriage act of November 9, 1875, is not inconsistent with the Constitution, laws, or treaties of the United States.

That section is valid and binding on all citizens of the Choctaw Nation, but affects only their rights acquired under said act.

The fact that a white man was divorced from his Indian wife, upon her petition, is evidence that he parted from her without just provocation, and brings the case within the provision of the Choctaw act of October, 1840, declaring that any white man parting from his wife without just provocation shall be deprived of citizenship.

DEPARTMENT OF JUSTICE,
March 1, 1888.

SIR: Your letter of the 27th of January, 1888, submits for my consideration the following questions:

(1) "Does the seventh section of the Choctaw intermarriage act, approved November 9, 1875, conflict with the Constitution, laws, or treaties of the United States? and, if not,

(2) "Is said section valid and binding as to persons who became citizens by intermarriage contracted before the 9th of November, 1875, and who married aliens subsequent to said date?"

(3) "Does the fact that the claimant was divorced from his wife, upon her petition, bring him within the provision of the act of October, 1840 (Choctaw), that any white man parting from his wife without just provocation shall be deprived of citizenship?"

The seventh section of the Choctaw intermarriage act referred to provides:

"Be it further enacted, That should any man or woman, a citizen of the United States or of any foreign country, become a citizen of the Choctaw Nation by intermarriage, and he or she be left a widow or widower, he or she shall continue to enjoy the rights of citizenship, unless he or she shall marry a white man or woman, or person, as the case may be, having no rights of Choctaw citizenship by blood; in that case all his or her rights acquired under the provisions of this act shall cease."

The Choctaw Indians, having kept up their tribal organization, are a dependent domestic nation within the boundaries of the United States. Without naturalization, they are not citizens of the United States within the meaning of the fourteenth amendment to the Constitution (*Elli v. Wilkins*, 112 U. S. R., 103.) By the fourth article of the treaty between the Choctaws and the United States of the 27th of September, 1830 (7 Stat., 333), it is stipulated:

"The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of red people the jurisdiction and government of all the persons and property that may be within their limits, west * * *;

Laws of the Choctaw Nation.

but the United States shall forever secure said Choctaw Nation from and against all laws, except such as from time to time shall be enacted in their own national councils, not inconsistent with the Constitution, treaties, and laws of the United States."

The seventh section of the treaty of the 22d of June, 1855 (11 Stat., 612), stipulates :

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits; * * * and all persons, not being citizens or members of either tribe, found within their limits shall be considered intruders, and be removed from and kept out of the same by the United States agent."

These treaty stipulations reserved to the Choctaws full legislative powers, only limited by the Constitution, the laws, and treaties of the United States. Section 1839 of the Revised States excludes regularly organized tribes of Indians from the effect of legislation by Congress with reference to the Territories. I am not aware of any statute of the United States inconsistent with the section referred to in your letter, nor has any been brought to my notice by those denying the validity of it. Article 26 of the treaty of the 28th of April, 1866 (14 Stat., 777), is claimed to deprive the Choctaw Nation of the power to make the enactment referred to. That article stipulates :

"The right here given to Choctaws and Chickasaws respectively shall extend to all persons who have become citizens by adoption or marriage with said nations or who may hereafter become such."

The right referred to in this article is the right to make selections of land in severalty, as set forth in detail in the treaty from article 11 to article 25 inclusive. Article 10 of the same treaty expressly reaffirms the treaties previously existing, except as modified by the treaty of 1866. Article 26, above quoted, establishes no rule as to who are or who in the future shall become Choctaw citizens, nor does it define

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or prescribe what shall constitute the rights of Choctaw citizens beyond the one referred to in it. Article 38 of the same treaty is relied upon as restrictive of the powers of the Choctaws to legislate with reference to the granting or withholding of citizenship to whites. This article stipulates:

"Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw Nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

The language of the treaty is in the past. It is not restrictive of future action by the nations, but rather enlarges or confirms the previous legislative power. It applies to and provides for those who at the time of the making of the treaty were citizens by adoption or intermarriage. It does not enlarge the rights of such citizens, nor relieve them from any conditions subject to which they held and enjoyed the right of citizenship. It declares they shall be subject to the laws of the Choctaws according to their domicile. If they held citizenship subject to any condition or limitation at the time the treaty was made, the condition or limitation was a part of the law subject to which they held their citizenship, and such law was obligatory after the treaty as it was before. Therefore, so far as these treaty provisions are concerned, the Choctaw Nation is left free in the future to enact laws with reference to what shall be the qualifications of citizenship and what shall be the privileges accorded to citizens by adoption or intermarriage.

The section of the Constitution of the United States with which the seventh section of the law under consideration is claimed to be inconsistent is the first section of the fourteenth article of amendments, which declares:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any

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State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The case of *Elk v. Wilkins*, above cited, rules that Indians during the continuance of their tribal organization, without naturalization, are not citizens of the United States. The last clause of this section of the Constitution, even if inconsistent with the law under consideration (which is not conceded), is a limitation on the powers of the States; and, however just in the abstract, does not by its terms apply to the Choctaw Indians, who are not organized as a State, but exist as a dependent domestic nation. The section referred to in your first inquiry is prospective, and is answered in the negative.

In reply to your second inquiry: The seventh section referred to applies only to rights acquired under the act of the 9th of November, 1875. It does not divest any rights unless the act of 1875 conferred additional rights on widows or widowers which they had not possessed before the passage of the act. If any additional right is conferred by the act, the person who acquired it, under the provisions of the law, would not be entitled to the additional right, unless he or she conformed to the condition thereof, subject to which it was granted. The act or law therefore is valid and binding on all the citizens of the Choctaw Nation, but only affects the rights which were acquired under the act of 1875.

Your third question refers to the Choctaw act of October, 1840. That act provides for marriages between white men and Choctaw women, and declares that a white man who was married according to the provisions of the act should "be entitled and admitted to the privilege of citizenship," and concludes:

"Any white man parting from his wife without just provocation shall forfeit and pay over to his wife such sum or sums as may be adjudged by the district court for said breach of the marriage contract and be deprived of citizenship."

The fact of a husband parting from his wife without just provocation, when legally determined, is followed by the

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deprival of citizenship; but that fact must be judicially established in accordance with the laws of the nation.

The proceeding in which the question propounded arises, as shown by the papers transmitted, was originated by a claimant who presented his petition to the Choctaw national council to establish his right to citizenship by intermarriage. The jurisdiction of the council to pass upon the facts necessary to determine the question is granted by an act of the Choctaw council approved October 21, 1882. The judgment of that council is in this case brought before you on appeal. The question you ask is one of evidence. The fact set forth is, that the claimant was divorced from his wife upon her petition. The question of fact to be determined is, does the record in that case establish the fact that the white man, from whom the divorce was obtained by his wife, parted from his wife without just provocation? The general rule of evidence (though subject to numerous exceptions) is, that a record is only evidence between the parties to that record. In this case the wife is not a party; yet, as an exception to the general rule, the judgment or decree is evidence as to the status of the parties as husband and wife, that they are separated, and that the provocation which justified the separation was given by the husband (1 Greenleaf on Evidence, sec. 525; *Burlen v. Shannon*, 3 Gray, 387). The record in the divorce case is not before me. Whether it shall be conclusive as evidence or not must be determined from the record. If the proceedings in the divorce are regular, the allegations sufficient, and the decree final, the granting of the divorce to the wife establishes that she had just cause for separation from her husband. It also establishes that he had no just or sufficient defense to the cause she alleged. The separation on his part, therefore, is established by the decree to have been without just cause, and that he parted from her without just provocation.

Subject to these conditions, your third question, as a question of evidence, is answered in the affirmative.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

Membership of Indian Tribe.

MEMBERSHIP OF INDIAN TRIBE.

Case of two brothers, W. C. Lykins and E. W. W. Lykins, claiming to be members of the confederated tribes of the Kaskaskias, Peorias, Weas, and Piankeshaws, considered.

DEPARTMENT OF JUSTICE,
March 2, 1888.

SIR : In replying to your communication of February 17, 1888, containing certain questions upon which an opinion is asked, I beg to say that I have made the basis of the following opinion the statement of facts contained in the communication of the Commissiouer of Indian Affairs of February 15, 1888, to which you refer me; but the other papers transmitted it has not been necessary to examine, as I have no power to find facts in any case in which my opinion is requested, but must confine myself to the facts appearing in connection with the request.

Two brothers, W. C. Lykins and E. W. W. Lykins, claim to be members of the confederated tribes of the Kaskaskias, Peorias, Weas, and Piankeshaws. That their father, David Lykins, who also went under the Indian name of Ma-cha-ko-me-ah, was a member of the tribe is established by the unquestioned facts that he was one of the commissioners who negotiated and executed the treaty of May 30, 1854 (10 Stat., 1082), by which the confederation of tribes was affected, and is named in the schedule accompanying the treaty, and containing the names of "persons or families composing the united tribe of Weas, Piankeshaws, Peorias, and Kaskaskias."

David Lykins is dead, and his two sons claim through him the right of membership in the confederated tribe.

Further than the recital of a public act by the chiefs of the Peoria, Kaskaskia, Wea, and Piankeshaw Indians, being a formal assent of these chiefs to a sale of 80 acres of land by the Lykins brothers as sole surviving heirs of David Lykins, which land, as is recited in the act of assent, was "originally granted to Ma-cha-ko-me-ah, or David Lykins, late a member and reserve of our tribe, by the United States," there does not seem to have been any official acknowledg-

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ment of those persons as members of the tribe until June 15, 1878, when the chiefs and councillors of the tribe issued a certificate of membership to them, declaring them "entitled to membership as sons of David Lykins, who was a member in his life-time," and this certificate was approved on July 15, 1878, by Agent Jones.

Questions are raised as to the validity of the act of placing the names of the Lykins brothers on the rolls of the confederated tribes, but these questions need not be noticed, because the twenty-third article of the treaty with the Peorias, Kaskaskias, etc., of February 23, 1867 (16 Stat., 519), makes them, relatively to the United States, entirely unimportant.

That article provides, amongst other things, that "*the said chiefs shall have the exclusive right to determine who are members of the tribe, and entitled to be placed upon the pay-rolls.*"

In my opinion, it was the object of this provision to relieve the United States of all responsibility or duty of inquiry touching the names on the "pay-rolls" of the tribe, and for an obvious reason. It was the Indians, and not the United States, that were interested in the distribution of what was periodically coming to them from the United States. It was proper then they should determine for themselves, and finally, who were entitled to membership in the confederated tribe and to participate in the emoluments belonging to that relation.

The certificate of the chiefs and councillors referred to is possibly as high a grade of evidence as can be procured of the fact of the determination by the chiefs of the right of membership under the treaty of February 23, 1867, and seems to be such as is warranted by the usage and custom of the Government in its general dealings with these people and other similar tribes.

It follows, then, that while these names are on the rolls of the tribe the individuals represented by them must be treated by the United States as members of the tribe.

This satisfactorily answers all the questions submitted and renders an answer to each unnecessary.

Very respectfully, yours,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

Sales of Indian Lands in Kansas.

SALES OF INDIAN LANDS IN KANSAS.

The State of Kansas is not entitled, under the third section of the act of January 29, 1861, chapter 20, to 5 per centum of the proceeds of the sales of the Indian lands in that State, which proceeds the United States, as a consideration for the extinguishment of the Indian title, agreed to receive, hold in trust, and pay over to the Indians.

DEPARTMENT OF JUSTICE,
March 5, 1888.

SIR: Your letter of the 10th of January, 1888, submits the following statement and question:

"At the time of the admission of Kansas there were large bodies of Indian lands within the jurisdiction of the State, although not within its political jurisdiction, that belonged to the Indians by original title and treaty stipulations, that after the admission of the State were ceded by the Indians to the United States for the purpose of being sold, the proceeds to constitute a fund to belong to the Indians, and the question presented is whether the State of Kansas is entitled to 5 per cent. of the sales of said lands."

The State of Kansas claims that 5 per cent. of the proceeds of the sales of the Indian lands shall be paid to the State. The claim is founded on an acceptance by Kansas of proposition five, made by the United States to the State at the time of its admission, whereby the United States became obligated according to the terms of the proposition. That proposition is contained in the third section of the act of the 29th of January, 1861 (12 Stat., 127), and is:

"Fifth. That five per centum of the *net* proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of said State into the Union, *after deducting all the expenses incident to the same*, shall be paid to said State, for the purpose of making public roads and internal improvements, or for other purposes, as the legislature shall direct."

The proposition, when accepted, assumed the form of a legislative contract, and is to be so interpreted, subject to the rule stated in *The Dubuque and Pacific Railroad Company v. Litchfield* (23 How., 88), that "All grants of this description are strictly construed against the grantees, and

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nothing passes but what is conveyed in clear and explicit language. As the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed can not be implied." This principle is applied to a grant to a State in the case of *Leavenworth, etc., Railroad Company v. The United States* (92 U. S. R., 740).

In the determination of the rights of the State of Kansas under the grant the first question that arises is, of what is Kansas entitled to receive 5 per cent.? The reply, in the language of the act, is, "of the *net proceeds* of sales of all public lands, after deducting all the expenses incident to the same." To ascertain what the net proceeds are the gross amount of the sales must be first determined; then all the expenses incident to the land liquidated, and the latter deducted from the former. From your letter and the accompanying papers I understand that all the lands of which Kansas claims a part of the proceeds of sale were Indian lands, as to which the Indian title had not been extinguished at the time of the admission of the State, and which were then in reservation from the public lands and occupied by several Indian tribes. The Indians had a right of occupancy of the lands for an indefinite time. Until that right of occupancy should be extinguished by purchase or otherwise the lands could not be sold by the United States. To remove the Indians and relieve the title from their right of possession was indispensable to qualify the lands for sale. Whatever it might cost to do this was an expense incident to the lands, and to such a sale as was contemplated by the act of admission; for it was and is a well-known usage of the Government not to sell lands until the Indian title of occupancy should be extinguished, and neither party to this compact contemplated the adoption of any other course with reference to this transaction. The parties to the contract knew of the Indian right of possession, and that its removal was an incident that must precede the sale. The removal of this Indian title was an expense which should be charged up against the gross proceeds of the sale and subtracted from them before the net proceeds of the land would be obtained. After this and all other expenses had been deducted the balance,

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if any, would be the net proceeds. If there is no balance there is no fund subject to distribution between the United States and Kansas. The intent of the compact was that the United States should pay to the State 5 per cent. of the net moneys which the Government, *in its own right*, received from the sales of public lands, and which might be rightfully applied out of the money received to the payment of the State. As to the 5 per cent., Kansas stood on no higher plane than the Government did as to the 95 per cent. If the Government could not rightfully apply the 95 per cent. to public uses, it could not be called upon to apply 5 per cent. to the use of Kansas. The Supreme Court of the United States, constraining substantially similar compacts made with the States of Illinois and Iowa, respectively, in the *Five Per Cent. Cases* (110 U. S. R., 482), declares: "When each of these acts speaks of lands sold by Congress, '5 per cent. of the net proceeds' of which shall be reserved, and be 'disbursed' or 'appropriated' for the benefit of the State in which the land lies, it evidently has in view sales in the ordinary sense, from which the United States receive proceeds, in the shape of money payable into the Treasury, *out of which the 5 per cent. may be reserved and paid to the State.*"

You state that the lands sold were ceded by the Indians for the purpose of being sold, the proceeds to constitute a fund to belong to the Indians. Among the lands thus acquired, as an illustration, I find the greater part of the fund out of which the State claims 5 per cent. accrued from lands sold by the United States which were acquired from the Osage Indians by treaty of the 29th of December, 1865 (14 Stat., 687). By that treaty the whole amount of the proceeds of the sales of the land to be made by the United States is agreed to be paid to the Indians, or held in trust for them as a consideration for the cession of the Indian title to the land to the Government. No part of the net proceeds of the sales belonged to the United States. No part of them can be reserved from the Indians or applied to public use. The whole of the net proceeds constitute the consideration paid by the United States to the Indians to secure an extinguishment of their title. There are no net proceeds in the sales of these lands; for the United States, *in their own right*, receive nothing whatever. Out of the fund received for the Indians the

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United States can not rightfully deduct 5 per cent. for the benefit of Kansas, nor rightfully apply any portion of the fund to public use.

That the United States, in order to open up the Indian lands in the State of Kansas to settlement, made such a bargain with the Indians in the purchase of their title as that no compensation whatever was received for the title in remainder which was vested in the Government, does not impose on the Government an obligation to pay a percentage to Kansas for money which the Government might have obtained *in its own right* at some distant time, but did not. The compact was not intended to confer upon the State any power to restrain the United States in its treaty-making powers, nor to confer upon the State any right to control the action of the General Government with reference to the price or amount which should be realized out of the Government title for public use. That the expense incident to throwing the lands open to the public consumed the whole fund, if such expense was just and necessary to the best interests of the nation at large, and especially to the people of Kansas, does not subject the United States to an indebtedness for any part of the expense paid, or contracted to be paid, by the Government. The right of Kansas is only what she acquired by the compact at the time of her admission. The law of admission is the legal and official determination of its policy. What the policy of the Government was with reference to other States, as to which other circumstances existed and other and different legislation declared the policy, should not control the intent of the law which is applicable to this subject. It would be alike unprofitable and irrelevant to pass upon the rights of other States, which are not before me, in determining this question.

It is therefore concluded the State of Kansas is not entitled to 5 per cent. of the proceeds of the sales of the Indian lands referred to in yours, which the United States, in order to and as a consideration for the extinguishment of their title, contracted to receive, hold in trust, and pay to the Indians.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

Extra Compensation.

EXTRA COMPENSATION.

The elements necessary to justify the payment of compensation to an officer for additional services are, that they shall be performed by virtue of a separate and distinct appointment authorized by law; that such services shall not be services added to or connected with the regular duties of the place he holds; and that a compensation whose amount is fixed by law or regulation shall be provided for their payment.

A United States marshal, appointed an agent in pursuance of section 5276 Revised Statutes to bring back a fugitive criminal from a foreign country, is entitled to receive compensation for this service out of the fund appropriated "for bringing home fugitive criminals," where the amount of the compensation is fixed by regulation before his appointment; otherwise he is entitled to be paid his expenses only.

DEPARTMENT OF JUSTICE,

March 13, 1888.

SIR: I received your letter of the 1st of March, 1888. The question therein asked is, substantially, whether a United States marshal, who brings home a fugitive criminal from a foreign country, is entitled for such services "to compensation in excess of expenses" out of the fund appropriated "for bringing home fugitive criminals?"

Section 1764 of the Revised Statutes provides:

"No allowance or compensation shall be made to any officer or clerk by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever which any officer or clerk may be required to perform unless expressly authorized by law."

Section 1765 declares:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

These sections are in substance re-enactments of the third section of the act of the 3d of March, 1839 (5 Stat., 349), the

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second section of the act of the 23d of August, 1842 (5 Stat., 510), and the twelfth section of the act of the 26th of August, 1842 (5 Stat., 525).

The construction of these statutes has been repeatedly passed upon by my predecessors, and their opinions are not entirely reconcilable. They were rendered on different facts, and the salaries and compensations of the officers and persons referred to were provided for by different statutes. A rehearsal of the facts and analysis of the law and views expressed in each would not be profitable and would unduly extend the limits of this opinion. The general results may be ranged in two separate classes by a representative of each class.

Attorney-General Black, in an opinion rendered on the 17th of October, 1859 (9 Opin. 127), thus states the one view:

"My conclusion is that no officer of the Government having a salary fixed by law, nor no other person whose compensation amounts to \$2,500 per annum, can receive extra pay for any service whatever, whether it be within the line of his duty or outside of it. Nor is it possible for any such officer to receive the salaries of more than one office, no matter under what circumstances he may have performed the duties of more than one."

The general result, as thus announced in this opinion, is in substance corroborated by the opinions of Attorneys-General Grundy (3 Opin., 422; *ib.*, 473); Gilpin (3 Opin., 621); Legarè (4 Opin., 126; *ib.*, 139); Mason (4 Opin., 464); Nelson (4 Opin., 342); Toucey (5 Opin., 74); Bates (10 Opin., 436).

The other view is thus stated by Attorney-General Crittenden in an opinion rendered on the 7th of June, 1851 (5 Opin. 765).

"At the passage of these acts there was no law forbidding any person from holding under the Government of the United States two compatible offices or employments at one and the same time, and receiving the salary and emoluments belonging to each of the offices, whether fixed directly by law or by a regulation made by a person lawfully authorized to make it. These sections do not forbid it. They are intended to fence against arbitrary extra allowances in each particular case; but do not apply to distinct employments with

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salaries or compensation affixed to each by law or by regulation.

* * * * *

"The plain meaning of this seems to be, that an individual holding *one* office and receiving its salary shall in no case be allowed to receive also the salary of *another office* which he does *not hold*, simply on account of his having performed the duties thereof.

"The prohibition is against his receiving the salary of an office that he does *not hold*, and not against his receiving the salaries of two offices which he *does legitimately hold*."

This construction is partially supported by the opinions of Attorneys-General Black (9 Opin., 508); Cushing (6 Opin., 81; 8 ib., 325); Evarts (12 Opin., 459); Devens (15 Opin., 306).

I am relieved from the embarrassment of choosing sides in the apparent disagreement between authorities of such high respectability by the conclusive interpretation given the sections under consideration by the Supreme Court of the United States. In the case of *Converse v. The United States* (21 How., 463), that court held that the collector of customs of Boston, whose salary as collector exceeded \$2,500 per annum, was entitled to receive in addition lawful commissions for his services as purchasing agent for such supplies necessary for the light-house service as were to be used by the United States outside of his own district.

The case of the *United States v. Shoemaker* (7 Wall., 338), rules that the collector of customs who, between the 1st of April, 1857, and the 12th of June, 1858, had disbursed, under the instructions of the Secretary of the Treasury, the money appropriated for the erection of the new marine hospital and custom-house *within his own district* was not entitled to receive any commission therefor. The ground on which the decision is placed is:

"It is admitted that there is no act of Congress authorizing it. The claim must rest, therefore, in a *quantum meruit*. This might, under some circumstances, present a strong case against the Government for the allowance of reasonable compensation. But the difficulty here is that there is not

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only no law providing for compensation, but the collector is forbidden to receive it."

In the case of *Hall v. The United States* (93 U. S. R., 563), which was a suit on the bond of an internal-revenue collector, the collector sought to set off claims for extra allowance for services rendered by him. It did not appear that the Secretary of the Treasury, who at his discretion was authorized, under the act of the 30th of April, 1864, to make such allowance, had ever authorized the allowance. The court ruled the defendant was not entitled to the set-off, declaring—

"Nor can any compensation for extra services be allowed by the court or jury as a set-off in a suit brought by the United States against any officer for public money in his hands, unless it appears that the head of the Department was authorized by the act of Congress to appoint an agent to perform the extra service, that the compensation to be paid for the services was fixed by law, that the service to be performed had respect to matters wholly outside of the duties appertaining to the office held by the agent, and that the money to pay for the extra services had been appropriated by Congress."

In the case of the *United States v. Brindle* (110 U. S. R., 688), the United States sued the defendant to recover a balance claimed to be in his hands as receiver of a land office. The defendant claimed to set off commissions for the amount received by him for the sales of Indian lands which he had been employed to receive, but which were not within the line of his duty as receiver of public lands. The amount of his compensation was not fixed by law for the additional service. The set-off was allowed by the court below. The judgment was affirmed by the Supreme Court on the ground that it was a special service, not within the line of the defendant's official duty, and that "in legal effect the appointment was to an agency for the sale of lands for the Indians, with an implied understanding that a reasonable compensation would be paid for the services rendered," and that the duties were of a different character, and at a different place, from those of the land office. This case differs from the case of *The United States v. Converse*, in which the fact existed that the amount of compensation to be paid was fixed by

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law, and in this respect might seem to enlarge the right of compensation to the officers, so as to include services in which the amount of compensation is implied from the service in pursuance of the additional appointment, without the amount being fixed by law or in accordance with the regulation made by the head of a Department. But the cause of difference appears to have arisen from the fact that the additional duty was one to be performed for the Indians, and payable out of a trust fund received by the United States for them. This is to be inferred from the language of the Chief-Judge above quoted.

The last case in which the subject is considered by the Supreme Court is that of *The United States v. Saunders* (120 U. S. R., 126), which was decided on the 24th of January, 1887. The opinion in this case adopts the interpretation placed upon the section by Attorney-General Crittenden above cited, that the sections "do not apply to distinct employments with salaries or compensation affixed to each by law or by regulation." The court declares, Justice Miller delivering the opinion:

"We are of opinion that, taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which as such officer he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is, in the eye of the law, two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is, in such case, entitled to recover the two compensations."

From these authorities it may be derived that the elements necessary to justify the payment of compensation to an officer for additional services are, that they shall be performed

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by virtue of a separate and distinct appointment authorized by law; that such services shall not be services added to or connected with the regular duties of the place he holds; and that a compensation, whose amount is fixed by law or regulation, shall be provided for their payment. (See *Stanbury v. United States*, 8 Wall., 34.)

In reply to your inquiry, therefore, with reference to the marshal of whom you write, section 5276 of the Revised Statutes authorizes the payment of an agent in behalf of the United States to receive the delivery of criminals from a foreign government. If a United States marshal was appointed an agent, in pursuance of this section, to go to a foreign country to take the delivery of a criminal, his services performed in pursuance of such appointment would not be a duty added to or connected with the regular duties of his office as marshal. The appropriation bills provide for the payment of compensation for these services, but they do not specify the amount to be paid to such agent. But if the amount of compensation to be paid the agent was fixed by regulation of the Department before his appointment, he is entitled to receive the amount so established; if the amount was not fixed by regulation, he is not entitled to compensation beyond his expenses.

I am, respectfully, yours,

A. H. GARLAND.

The SECRETARY OF STATE.

RESURVEY OF PATENTED LANDS.

Where a substantial allegation of fraud or mistake is made, the sustaining of which will restore to the public domain land wrongfully patented, or subserve the public interest or protect the public right, the Commissioner of the General Land Office may, in his discretion, direct a resurvey of patented land.

Such survey would not be conclusive, but, in connection with other testimony, might be admissible as evidence to sustain the allegation.

DEPARTMENT OF JUSTICE,

March 16, 1888.

SIR: Your letter of the 7th of March, 1888, with a request for an expression of my opinion on the questions contained

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in a communication of the Acting Commissioner of the General Land Office, was received.

The questions asked by the Acting Commissioner are:

(1) "Has this office any legal authority to order a survey of lands which have been patented by the Government, and which *prima facie* belong to private citizens?"

(2) "Would said survey, when made (necessarily *ex parte* in its nature), and offered as evidence, be conclusive in the face of the patented survey, which is strictly official, and executed under express authority of law, and which has not been successfully impeached?"

(3) "Would an *ex parte* survey made by the Government on lands which are not for the present under its control be competent evidence, such as would be received by the court, in view of the decision of the circuit court of California, *United States v. Western Pacific Railroad Company* (8 Sawyer, p. 81)?"

These questions are answered in their order:

1. The public lands, or the public interest therein alone, are under the general law committed to the care of the Commissioner of the General Land Office, subject to your supervision. After the Government has taken all the preliminary legal steps leading to a patent and issued the patent for the land to the purchaser or rightful claimant, without fraud or mistake, the land becomes private property. If a contest as to boundary arises after the delivery of the patents to two such patentees, the Government has no legal interest therein, except to furnish the proper judicial tribunals and process by which the private contention can be justly settled. In such a contest between private parties for their private interest, the Government, as between two of her citizens, each of whom has an equal right to her protection, should not cast the weight of her influence in either scale of the balance of justice. In the courts the parties should be left on terms of equality to seek an unbiased judgment. So, after the delivery of the patents, where fraud or mistake is alleged, which affects only private rights, and where the public has no interest in the lands, and no public right is to be subserved or protected, there is no legal authority vested in the Commissioner of the General

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Land Office to expend public money to make surveys to sustain allegations of fraud on one side or the other. In such a case his power ends with the issue of the patent, and the wrong, if any exists, must be redressed through the courts. But where substantial allegations of fraud or mistake are made, the sustaining of which will restore to the public domain lands wrongfully patented, or subserve the public interest, or protect the public right, the Commissioner may, in his discretion, direct a survey as a part of the investigation to sustain the alleged fraud or mistake, and to furnish evidence in the proper court to establish it.

Subject to the conditions last stated, your first inquiry is answered in the affirmative.

2. A survey made under the circumstances stated would not be conclusive, but on allegation of fraud in the original running of the lines might, with other facts, be evidential.

3. In connection with other testimony to establish fraud or mistake in the original running of the lines, the testimony of the surveyor who reran the lines as to the facts found by him on the ground, together with the plats made by him, might be admissible as evidence to sustain an allegation of fraud or mistake.

I am, very respectfully, yours,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SUSPENSION OF TONNAGE DUTY.

Under the proclamation of the President, made on the 26th of January, 1888, in pursuance of the first *proviso* in section 11 of the act of June 19, 1886, chap. 421, a vessel entered in a port of the United States from Bremen, via Southampton, is exempted from payment of the tonnage-tax imposed by said section, although the vessel may have taken on board cargo, passengers, and mails at the last-mentioned port. But if the vessel had entered at and cleared from Southampton it is liable to the duty.

DEPARTMENT OF JUSTICE,

March 19, 1888.

SIR: I received your letter of the 12th of March, 1888, with the inclosed papers. You ask "Whether vessels entered

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in the United States from Bremen, via Southampton, and which have taken on board cargo, passengers, or mails at the port last mentioned, may be exempted from tonnage-tax in the United States?"

The answer must be derived from a construction of the eleventh section of the act of the 19th of June, 1886 (24 Stat., 81), and the proclamation of the President, made on the 26th day of January, 1888, in pursuance of the first proviso of that section. The part of the section which is to be considered provides:

"A duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States *from any other foreign ports*, not, however, to include vessels in distress or not engaged in trade: *Provided*. That the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered *from any foreign port*, as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed in said port on American vessels by the Government of the foreign country in which such port is situated."

The proclamation, so far as relevant to this inquiry, declares:

"Now, therefore, I, Grover Cleveland, President of the United States of America, by virtue of the authority vested in me by section 11 of the act of Congress entitled 'An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes,' approved June nineteenth, one thousand eight hundred and eighty-six, do hereby declare and proclaim, that from and after the date of this my proclamation shall be suspended the collection of the whole of the duty of six cents per ton, not to exceed thirty cents per ton per annum (which is imposed by said section of said act), upon vessels entered in the ports of the United States *from any of the ports of the Empire of Germany.*"

The proclamation strictly conforms to the law, and suspends the collection of the tonnage duty imposed by the eleventh section of the act "upon vessels entered in the

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ports of the United States from any of the ports of the Empire of Germany." The duty is suspended upon vessels entered from the Empire of Germany. It is not suspended on vessels entered from England. If the entry of the *Elba*, concerning which the question arose, was from Bremen, the tonnage duty should not be charged. If the entry was from Southampton, the duty was rightfully collected. The oath of entry for the *Elba* declares the vessel sailed "from the port of Bremen, Germany, via Southampton, England." The copy of instructions issued by the Treasury Department on the 1st of February, 1888, No. 19, announces—

"Information has been received showing that vessels belonging to * * * Germany, * * * arriving in the United States *directly* from the ports of the German Empire, may be admitted, under the proclamation, without the payment of the dues therein mentioned."

Southampton is not in the direct route from Bremen to the United States. But the word "*directly*" is not found in the law. There being nothing in the statute to limit the words used, they must have their full effect in construing them. Indeed, if exceptions so important were intended, they should have been placed in the statute. The language of the act is "entered from any foreign port." The departmental instructions cannot lawfully annex limitations to the right to the relief granted which the law does not warrant. The language, "from any foreign port," describes one terminus of a voyage, and the entry at the port of the United States the other. The voyage, in contemplation of law, from one to the other, is to be a unity. The intent and faithful performance of that does not require that the voyage shall be direct. The doctrine of deviation in marine insurance, by which the insurer is released from the obligations of the policy in consequence of the greater risk incurred by the vessel pursuing an unusual route, or touching at points unauthorized by the policy, does not apply in the construction of this statute. A mere deviation in the voyage, or a touching at intermediate ports, as incidents only, without entry at or clearance from any such port, does not break the continuity of the voyage, so as to make the

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intermediate port the port of departure contemplated by the statute. The fact that the ship took in cargo, passengers, and mails at Southampton is of little import on the question, as the tonnage-tax is on the ship, regardless of where she may have obtained her cargo; while the customs laws, by separate provisions, regulate the tax upon the cargo, equally regardless of the tonnage-tax on the ship. If the voyage as a unit was from Bremen to a port of the United States, and the vessel touched at Southampton, without entering or clearing there, the duty should be suspended; but if the vessel entered at and cleared from Southampton, the duty should be exacted.

The papers transmitted with yours are herewith returned.
I am, respectfully yours,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

PURCHASE OF SITE FOR PUBLIC BUILDING.

The act of March 5, 1883, chap. 23, entitled "An act for the purchase of a site, including the building thereon, etc., for the use of the office of the Chief Signal Officer of the Army," etc., does not carry with it an appropriation of money for the objects designated therein.

DEPARTMENT OF JUSTICE,
March 22, 1888.

SIR: Your letter of the 15th instant calls my attention to the act of March 5, 1883, entitled "An act for the purchase of a site, including the building thereon, etc., for the use of the office of the Chief Signal Officer of the Army," etc., and also to a provision in the act of August 7, 1882, chapter 433, declaring "that no act passed authorizing the Secretary of the Treasury to purchase a site and erect a public building thereon shall be held or construed to appropriate money, unless the act in express language makes such appropriation," and you inquire whether the Secretary of the Treasury is authorized to pay the sum specified in the former act, and if so, out of what moneys.

Purchase of Site for Public Building.

The act of March 5, 1888, authorizes the Secretary of the Treasury "to purchase or otherwise provide" a site (embracing a certain piece of ground in Washington, D. C., with the building now standing thereon), and on such portion thereof as is not already occupied by buildings to "cause to be erected" a substantial and commodious building, with fire-proof vaults; the cost of the whole not to exceed \$150,000, of which not more than \$112,000 is to be paid for the site. The same act further provides that no part of said sum shall be expended until a valid title to the site is vested in the United States.

This act makes no appropriation of money for the acquisition of the site mentioned or for the erection of the proposed building, unless the authority "to purchase or otherwise provide" a site and "cause to be erected" a building thereon may be taken to contain, *by implication*, an appropriation therefor. But such a construction is plainly forbidden by the provision in the act of August 7, 1882, quoted above. That provision, though embodied in an annual appropriation act, is permanent in its character, and should be allowed due effect in the construction of statutes like the one under consideration. It has the same operation it would have if inserted therein as an interpretation clause. According to it, authority given to the Secretary of the Treasury, as above, does not carry therewith an appropriation. Besides the omission of express words of appropriation, the failure to state out of what fund or moneys this payment should be made would render such payment by you impossible.

I am therefore of the opinion that no appropriation is made by the act of March 5, 1888, for the objects designated therein, and that you are not authorized to pay the sum specified in that act until such appropriation is made.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

Appeals From General Land Office.

APPEALS FROM GENERAL LAND OFFICE.

The consideration and determination of appeals to the Secretary of the Interior from the Commissioner of the General Land Office may be made by the Assistant Secretary of the Interior, under a regulation prescribed by the Secretary, pursuant to section 439, Revised Statutes.

DEPARTMENT OF JUSTICE,
March 31, 1888.

SIR: By your letter of the 16th of March, 1888, you ask "Whether the consideration and determination of appeals to the Secretary of the Interior from the action of the Commissioner of the General Land Office, jurisdiction of which was judicially affirmed in the case of *Snyder v. Sickles* (98 U. S. R., 203), may be made by the First Assistant Secretary of the Interior, or by the Assistant Secretary of the Interior, by and under his proper designation of office in either case, if the Secretary of the Interior shall by regulation prescribe the performance of such duty to either under and by virtue of section 439 of the Revised Statutes, or under any other enactment."

In an opinion rendered by me to your predecessor on the 23d day of July, 1886, I gave a construction to section 439, Revised Statutes, with reference to your power to prescribe the duties of the Assistant Secretaries. I then stated, as I now repeat, that the section "empowers the Secretary to make the Assistant, as it were, his deputy in all things. * * * So long as the powers delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the former is co-ordinate and concurrent with that of the latter." When the Assistant acts at a time the Secretary is not absent or sick, under a regulation made by the Secretary prescribing his powers, he should sign with his own proper official designation. When the Secretary is absent or sick, if the Assistant is in charge of the Department, in pursuance of sections 177 or 179, Revised Statutes, he should sign as Acting Secretary.

I am, respectfully, yours,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

Pottawatomie Indians.

POTTAWATOMIE INDIANS.

Under the act of April 4, 1888, chapter 59, the Secretary of the Interior is authorized to find that certain services rendered the Pottawatomie Indians were contracted for in good faith by persons empowered to represent said Indians.

DEPARTMENT OF JUSTICE,

April 16, 1888.

SIR: Your communication of the 14th instant, with inclosures, received. You ask the following question: Whether, if you shall determine that the services were rendered to the Pottawatomie Indians by E. John Ellis, esq., as claimed, you are authorized, upon the facts referred to, to find that these services were contracted for in good faith by persons authorized to represent said Indians within the meaning of the act, etc. My opinion is, that the act referred to, approved April 4, 1888, entitled "An act to enable the Secretary of the Interior to pay certain creditors of the Pottawatomie Indians out of the funds of said Indians," in view of all the facts and circumstances of the particular case mentioned, was intended to be curative—that is, to remove the difficulties that existed heretofore as to the payment of the money claimed by Mr. Ellis, as indicated in the three opinions of the Attorney-General referred to in your communication; and therefore I have no doubt you are authorized under that act to find that these services were contracted for in good faith by persons authorized to represent said Indians.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SOUTHERN PACIFIC RAILROAD LAND GRANT.

The *proviso* in section 23 of the act of March 3, 1871, chapter 122, excepts from the operation of the grant made by that section to the Southern Pacific Railroad Company of California all lands within the primary limits of the road of said company which also fall within the primary or indemnity limits of the grant to the Atlantic and Pacific Railroad Company now forfeited, and such lands can be restored to settlement and entry under the general land laws.

Southern Pacific Railroad Land Grant.

DEPARTMENT OF JUSTICE,
April 16, 1888.

SIR: By your letter of the 2d of March, 1888, you ask my opinion, "Whether the proviso to the twenty-third section of the act of the 3d of March, 1871 (16 Stat., 573), excepted from the operation of said grant lands within the primary limits of said road, where said lands fall also within the primary or indemnity limits of the Atlantic and Pacific Railroad Company now forfeited, and whether said lands can be restored to settlement and entry under the general land laws."

The twenty-third section of the act of the 3d of March, 1871, is found in the act incorporating the Texas Pacific Railroad Company, and provides:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to the said Southern Pacific Railroad Company by the act of July 27, 1866: *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

This section constitutes the grant of all the rights the Southern Pacific Railroad Company has to public lands for the branch line described in it. No subsequent legislation has either added to or diminished the rights of that company. Whatever rights the company had along the main line of its road under the act of July 27, 1866, are extended to this branch line, subject to the same limitations, restrictions, and conditions that are attached to it in the original grant, with the additional exception stated in the proviso. By that proviso all rights and privileges that would in "*any way affect or impair the rights, present or prospective,*" of the Atlantic and Pacific Railroad Company are excepted by the enactment from the grant to the Southern Pacific

Southern Pacific Railroad Land Grant.

Company, and as to any such right or privilege thus excepted no claim of any kind was ever vested in the Southern Pacific Company. The rights that were granted to the Atlantic and Pacific Railroad Company in their full breadth, as set forth in the act of July 27, 1866, are excepted by the proviso. The exception includes all the rights, both present and prospective, of the Atlantic and Pacific Company. The rights excepted are those which on the 3d of March, 1871, *existed*, and those which the legislation as it then stood *promised*, to the Atlantic and Pacific Company. It is to be observed that it is not *titles*, but *rights*, that are excepted. Whether those rights ever ripened into titles or not can neither enlarge nor diminish the scope of the exception. If, by subsequent legislation, additional rights had been granted to the Atlantic and Pacific Railroad Company, such additional rights would not extend the length of the exception; nor, if by like legislation that company's rights had been diminished, would it contract its breadth. The exception was a fixed boundary, whose limits were to be determined as the rights, present and prospective, existed at the time of its enactment. By the third section of the act of the 27th of July, 1866 (14 Stat., 294), the rights of the Atlantic and Pacific Railroad Company, material to be considered in answer to your inquiry, are found. That section contains a present grant of every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad. The right to the lands thus granted was a present right at the time of the acceptance by the company of the provisions of the act of 1871, and therefore came within the proviso. (*Van Wyck v. Knevals*, 106 U. S. R., 360.) In addition thereto, the section granted an indemnity limit of 10 miles on each side of the granted limits. This was a *prospective right*, to take effect on condition that the amount of twenty alternate odd sections of unreserved public land could not be found on each side of the road within the primary limits. If another railroad in 1871, and continuously thereafter, should have the right to take the odd numbered sections of land within the secondary limit, it would very seriously *affect and impair* this prospective right. This secondary limit also was

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intended to be protected by, and was included within, the exception contained in the proviso.

The inquiries contained in yours, as above stated, are therefore answered in the affirmative.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

NEW SITE FOR FORT BRADY.

Upon the facts submitted, which are set forth in the opinion: *Advised that, under the deed of Thomas Ryan and wife, dated December 18, 1866, granting to the United States certain land at Sault Ste. Marie, Mich., selected for a new site for Fort Brady, the title to the premises has become vested in the United States.*

DEPARTMENT OF JUSTICE,
April 16, 1888.

SIR: In compliance with the request contained in your letter to me of the 6th of February last, I have considered the petition of Mr. Thomas Ryan, of Sault Ste. Marie, Mich., for the cancellation of a deed executed by himself and wife, December 18, 1886, granting to the United States certain land in that place. From that letter, the papers submitted therewith, and other sources I gather the following facts:

The act of July 8, 1886, chapter 747, authorized the Secretary of War to purchase a new site for Fort Brady, in or near the village of Sault Ste. Marie, Mich., provided the title thereto should be approved by the Attorney-General. Subsequently a Board of Army Officers was appointed to select such site, and among other proposals received by it was the following:

"SAULT STE. MARIE, September 8, 1886.
"To the honorable the Board of Survey:

"SIRS: I am instructed by Mr. Ryan to offer the southwest $\frac{1}{4}$ of southwest $\frac{1}{4}$ of section 6, and the southeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section 1 (both in towns. 47 N., of ranges 1 E. and W.), containing 80 acres, more or less, if sold together, gether, for the sum of \$12,000.

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"Although not authorized yet, I assume that Mr. Ryan would sell any portion of said lands at a price in ratio to the above (*i. e.*, \$150 per acre).

"THOMAS RYAN,
"By W. B. CADY.

"P. S.—The above offer is subject to the opening of Easterday avenue along the south line."

The Board having recommended the purchase of the property described in this proposal, the Acting Secretary of War, on the 11th of September, 1886, telegraphed his approval thereof, and Mr. Ryan was thereupon notified by the president of the Board of the acceptance of his offer, the notice being in writing, as follows:

"FORT BRADY, MICH., September 11, 1886.

"THOMAS RYAN,

"Sault Ste. Marie, Mich.:

"SIR: You are hereby notified that the Acting Secretary of War has approved the recommendation of the Board of Officers now in session at this post, that your proposal, dated September 8, 1886, be accepted, *viz.*, for the sale of certain tracts of land described in your proposal, as follows: The southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 6, and the southeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section 1, subject to the opening of Easterday avenue along the south line, for \$12,000.

"Very respectfully, your obedient servant,

"HENRY L. ABBOT,

"Lieut. Col. of Engineers, President of the Board."

Afterwards Mr. Ryan received a letter requesting the speedy preparation of his title papers, of which the following is a copy:

"UNITED STATES ENGINEER OFFICE,
"34 CONGRESS STREET, WEST,
"Detroit, Mich., October 6, 1886.

"THOMAS RYAN, Esq.,

"Sault Ste. Marie, Mich.:

"SIR: I have received from the War Department the following letter of instructions, *viz.*:

"The recommendation of the Board, approved by the Department, selects a tract of about 75 acres of land at Sault

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Ste. Marie, owned by Thomas Ryan, as the new site for Fort Brady, at the proposed price of \$12,000. Papers on file show Mr. Ryan's address to be Michigan Exchange Hotel, Detroit. Please take the proper steps, without delay, to collect and forward to this Department the necessary deeds and other title papers for the conveyance of this land to the United States for examination by the Attorney-General, as required by law. General Orders, 47, Headquarters of the Army, Adjutant-General's Office, of 1881, published regulations of the Department of Justice concerning such title papers, a copy of which will be forwarded to you by mail.

"R. C. DRUM,
"Acting Secretary of War."

"I have therefore to request that you will proceed as rapidly as possible with the preparation of the requisite papers, and to aid you in this I inclose herewith a copy of General Orders, No. 47, Headquarters of the Army, Adjutant-General's Office, May 13, 1881, above referred to.

"Please acknowledge receipt of this communication, and inform me as to how soon you can begin the preparation of the papers in question.

"Very respectfully, your obedient servant,

"O. M. POE,
"Lieut. Col. of Engineers, Bvt. Brig. Gen., U. S. A."

To the foregoing letter the following response was made:

"OCTOBER 13, 1886.

"General O. M. POE:

"SIR: I have the honor of acknowledging your favor of the 6th instant to Thomas Ryan. I am acting for Mr. Ryan in preparing his title for the inspection of the Attorney-General. I expect to be able to send on the necessary papers in from six to eight weeks.

"Yours, very respectfully,

"W. B. CADY.

"To O. M. POE,

"Lieut. Engineers, Bvt. Brig. Gen., U. S. A.,

"Detroit, Mich."

In the latter part of December, 1886, an abstract of title and other papers, including a deed of the above-described prem-

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ises to the United States executed by Ryan and wife, dated December 18, 1886, were sent by W. B. Cady to General Poe, who thereupon transmitted all the papers to the United States attorney for the western district of Michigan, with a request that he examine the title to the property.

On the 23rd of March, 1887, the Secretary of War transmitted these title papers, accompanied by an opinion of the United States attorney thereon, dated the 17th of same month, to the Attorney-General, with a request for his advice "as to the validity of the title to the lands in question, and whether the inclosed deed is sufficient to vest the title in the United States." Before the question had been passed upon by the Attorney-General a letter was received by him from the Secretary of War, dated April 5, 1887, inclosing a copy of a letter from Messrs. Brennan & Dounelly of Detroit, Mich., which reads as follows:

"DETROIT, April 1, 1887.

"Hon. Wm. C. ENDICOTT,

"Secretary of War, Washington, D. C.:

"SIR: Mr. Thomas Rya, of Sault Ste Marie, in this State, with whom your Department had some negotiations some months ago for the purchase of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 6, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ section 1, in said town, as a site for Fort Brady, has instructed us to say that he has arranged for a different disposition of the property, and further negotiations are unnecessary. Will you please return to him all papers submitted to the Government concerning said property?

"Very truly yours,

"BRENNAN & DONNELLY."

On receipt of the last-mentioned letter of the Secretary the papers were returned to him by the Attorney-General without other action; but by another letter, dated the 16th of same month, the Secretary resubmitted the title papers to the Attorney-General, with request for his opinion as to the validity of the title, etc. In response to this request an opinion was rendered by the Attorney-General on the 18th of May, 1887, as follows:

"Upon examination of these papers I find that a valid

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title to said land (*i. e.*, the premises hereinbefore described) is thereby deduced to Thomas Ryan, of that place (Sault Ste Marie), and I am of the opinion that the accompanying deed of conveyance from him and his wife to the United States, dated December 18, 1886, which is offered for the acceptance of the Government, is sufficient to pass a valid title to the premises, assuming, of course, that nothing affecting the title to the property has transpired since the date of the deed. Information on this point should be obtained before completing the purchase by having the searches for liens, incumbrances, etc., continued down to the present time."

On the following day, at the desire of the War Department, the Attorney-General transmitted the deed of Ryan and wife hereinbefore mentioned to the United States attorney for the western district of Michigan, for the purpose of having the same put on record. Accompanying the deed were the following instructions to the United States attorney:

"You are hereby instructed to continue the search for liens, incumbrances, etc., against the property from the date of the deed down to the present time, and should the title be found to be unaffected thereby and to remain unchanged, you are further instructed to have the deed recorded, after which payment of the purchase-money will be made in the usual way through the War Department."

The said deed of Ryan and wife was recorded on the 25th of May, 1887. In a letter to the Attorney-General touching this subject, dated the 28th of same month, the United States attorney states:

"I found upon investigation * * * that on the 4th of April, 1887, Thomas Ryan and wife deeded to the village of Sault Ste. Marie a strip of land 40 feet wide off the east side of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 6, and 40 feet off the west side of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 1, making together a strip 80 feet wide, for street purposes. I hereto attach a slip, with the land marked out, showing you what has been done to affect the title to the land; notwithstanding all this, I recorded the deed running to the United States.

"Perhaps I should explain further. Since this land was

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contracted to the Government a very remarkable business boom has struck Sault Ste. Marie, and Mr. Ryan claims that the land deeded to the Government is worth \$50,000 or \$60,000. He has made a claim that the Government was dealing with the expectation of purchasing it, and assuming that it had not been accepted as yet, but was under consideration by the Government; while I supposed you had accepted his offer to sell land for \$12,000. This being the situation, I took the responsibility of recording the deed, notwithstanding that 80 feet had been deeded away, thinking it would be the safest way to secure the Government, as the property is unquestionably worth more than \$12,000, although the conveyance of the street should be valid."

June 9, 1887, the Attorney-General addressed a communication to the Secretary of War, transmitting a copy of the aforesaid letter of the United States attorney, together with the slip therein mentioned. In that communication the following remarks were made:

"It appears that since the date of the deed, and before the same was recorded, namely, on the 4th of April, 1887, the said Ryan and wife deeded a small part of the premises to the village of Sault Ste. Marie for the purpose of a street. Notwithstanding this, the United States attorney thought it advisable to put the deed to the United States on record.

"By the law of Michigan an unrecorded deed is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded. If the conveyance to the village has been first duly recorded, and is otherwise within the provision of law just adverted to, its title to so much of the premises as is granted thereby would doubtless be superior to a title derived under the deed to the United States. However, should the use of that part of the premises for the purpose of a street be unobjectionable, the failure to derive title thereto under such deed may be unimportant."

The following statement, containing additional facts, is taken from the letter of the Secretary of War, of February 6, 1888, hereinbefore referred to:

"The Lieutenant-General recommended, June 24, that the

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ground be not purchased, unless the roadway referred to be given up to the United States by the village authorities.

"The papers were referred to Colonel Poe, to ascertain if the village authorities would relinquish the roadway.

"July 27, 1887, Colonel Poe reported that he had written to the president of the village of Sault Ste. Marie, and is informed that it is hopeless to expect favorable action by the present village council on the request for reconveyance of the strip of land mentioned. * * *

"The Secretary of War and General Sheridan held a conference November 25, 1887, and decided to await further action of the village council of Sault Ste. Marie; that the rights of the United States should be maintained, and that payment must be withheld until the roadway is relinquished to the Government, thus making the title of the United States good to the whole tract conveyed by the deed of Thomas Ryan to the United States.

"It is proper to add that it is the desire of the [War] Department to secure the tract of land in accordance with the terms offered by Mr. Ryan September 8, 1886."

The deed of Ryan and wife to the village, referred to above, was recorded April 12, 1887. With the exception of so much thereof as is granted by that deed, the entire tract has remained in his possession.

The petitioner, Thomas Ryan, claims that prior to the date of his letter to the Secretary of War requesting the return of the title papers (April 1, 1886) no contract existed between him and the Government by which either was bound; that the sale and purchase of the property were still in negotiation; that those papers, including the deed of himself and wife of December 18, 1886, were submitted for examination, merely; that until approval of the title by the Attorney-General and acceptance of the deed by the Government he was at liberty to withdraw from the matter, and that before the title was approved or the deed accepted he withdrew therefrom. He further claims to be still the rightful owner of the premises, states that the recording of said deed has created a cloud upon his title, and asks that the deed be canceled.

The inquiry presents itself, at the very outset, whether any

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valid and binding agreement for the sale of the land was concluded between the United States and Mr. Ryan prior to the execution and delivery of his deed into the hands of the Government agent. By the statement of facts hereinbefore set forth it appears that the premises were offered for sale to the United States by an agent of Ryan for a certain sum, and that the offer was accepted on the part of the Government, the acceptance being subject, of course, to the condition required by the statute, that the title should be approved by the Attorney-General. (See the correspondence of September 8, 1886, and September 11, 1886, *supra*.) Thereupon, in order to meet the statutory requirement just adverted to, Ryan was requested by the Government agent to proceed as rapidly as possible with the preparation of the requisite papers, which request his agent acknowledged, signifying an intention to comply therewith. (Correspondence of October 6, 1886, and October 13, 1886.) This is substantially the evidence appearing in the case which has any bearing upon the inquiry under consideration.

Mr. Ryan claims under these facts that because Mr. Cady, his agent, was not "lawfully authorized" by him to make the contract in pursuance of which he made the deed to the United States, that the whole transaction is void, as being within the provisions of section 6181 of Michigan statutes, which is substantially a re-enactment of a part of the English statute of frauds. The facts do not seem to justify the application of the principle he contends for. The deed, signed, sealed, acknowledged, and delivered by Mr. Ryan to his agent to deliver to the United States, which the agent did actually deliver, raised a sufficient presumption of ratification, if the original contract were material. The delivery of the deed to the agent, in pursuance of the contract which he made in the name of the principal, would certainly relieve the agent from the consequences of his alleged unauthorized acts, and make the acts of the agent those of the principal. (Story on Agency, sec. 244, and notes.) The delivery of the deed by the agent to the Government is *prima facie* a full execution of the contract, and passed a complete title. The possession of a deed by a vendee is presumptive evidence of delivery. The recording of the deed also gives

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rise to the same presumption. To overcome the effect of the possession of the deed by the vendee, and the recording of it, it would be incumbent on the grantor to establish affirmatively that the delivery was not made. When a deed is passed from the grantor to the grantee, whether the change of possession of the instrument shall be regarded as a delivery is to be determined from the intent of the parties. In Devlin on Deeds, section 289, it is stated that "the true rule would seem to be that when the grantor has *parted with all control* of the deed its acceptance by the grantees may be presumed if it be beneficial to him."

In the case of *Hatch v. Hatch* (9 Mass., 309), Justice Sewall declares:

"The delivery is an essential requisite to a deed, and the effect of it is to be from the time when it is delivered as a deed, but it is not essential to the valid delivery of a deed that the grantees be present, and that it be made to or accepted by him personally at the time. A writing delivered to a stranger for the use and benefit of the grantees, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as escrow. The distinction, however, seems almost entirely nominal, when we consider the rules of decision which have been resorted to for the purpose of effectuating the intentions of the grantor or the obligor, or in some cases of necessity. If delivered as an escrow, and not in name as a deed, it will, nevertheless, be regarded and construed as a deed from the first delivery as soon as the event happens or the condition is performed upon which the effect had been suspended, if this construction should be then necessary in furtherance of the lawful intention of the parties."

The preponderance of the facts in this case seems to show the grantor had parted with all control of the deed. It was never to be returned to him except on the condition prescribed by law, that if the Attorney-General should declare the title defective, then the whole transaction, whether existing in parole or established by legal written evidence, should be void. This condition, being public law, entered into and constituted a condition subject to which every step in the proceeding was taken. The condition was not made by the

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parties, nor for the benefit of the grantor, but for the protection of the Government. The grantor could not take advantage of it, and rescind a sale otherwise lawfully made whenever his whim or interest might suggest such a course. When the Attorney-General passed upon the title as good, this condition, fixed by law, was performed, and the delivery became absolute and unconditional. Under the facts submitted, the title to the land seems to be vested in the United States. The deed having been recorded, the title can not be revested in the vendor without a decree of court or Congressional authorization.

The proper course to be pursued, it is suggested, would be to determine what was the value of the street conveyed by the vendor to the village of Sault Ste. Marie before the recording of the deed to the United States, and, after subtracting that amount from the whole consideration in the deed, pay or tender the balance of the purchase money to the vendor, and take possession of the lands.

I am yours, respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

NOTE.—An action of ejectment was subsequently brought by the United States against Thomas Ryan, in the United States circuit court for the western district of Michigan, to recover the premises conveyed by the deed of said Ryan and wife referred to in the foregoing opinion, and verdict and judgment went in favor of the Government. The case was afterwards carried by writ of error to the Supreme Court, which affirmed the judgment of the court below. (See *Ryan v. United States*, 136 U. S., 68.)

MAIL TRANSPORTATION—DISCONTINUANCE OF CONTRACT.

The Postmaster-General may discontinue a contract for carrying the mail before expiration of the term thereof, allowing the contractor one month's extra pay, when in his judgment the public interests require such discontinuance, for the purpose of re-advertising and reletting the service on an increased schedule, in preference to permitting the contractor to perform the increased service at the pro rata to which he would be entitled under his contract.

DEPARTMENT OF JUSTICE,

April 20, 1888.

SIR: I received your letter of the 14th of April, 1888. You refer to certain statutes, regulations, and clauses in the

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proposals and contracts relating to the carrying of the United States mail, and submit for my opinion the question—

“Whether the Postmaster-General can lawfully discontinue a contract before the expiration of its term, allowing one month's extra pay, when in his judgment the public interests require such discontinuance, for the purpose of re advertising and reletting the service on such increased schedule, in preference to permitting the contractor to perform the increased service at the pro rata increase to which he would be entitled if the service were required under his contract.”

The question submitted is one of power, not one duty. The power may exist, and yet the circumstances surrounding a particular case may not in justice and good policy warrant the exercise of it. The duty to exercise a power is in many instances left to your just discretion. In the postal system the general rule is the mails are to be carried by contracts. Those contracts are to be let after and in pursuance of public advertisement to the lowest qualified competent bidder. The general intent is that the work shall be done at the lowest rate it can be done for, on contracts let by public, equal, fair, competitive bidding. All preferences or prejudices on private or personal grounds are intended to be avoided. Section 3956, Revised Statutes, declares: “No contract for carrying the mail shall be made for a longer time than four years.” There is no law forbidding contracts for a shorter term. Section 3960 provides that compensation for additional service in carrying the mails *shall not be in excess* of the exact proportion which the original compensation bears to the original service. This clause is a restriction that the compensation shall not be greater than in exact proportion paid for the original service, but it does not say it may not be less. Under the general intent of the law, if the additional service may justly be procured for less, it may rightfully be done. The changing interests of the public, and the good of the service, may require that the number of mails in a given time should be increased after a contract shall have been made. If but a single mail a week is called for in the advertisement for the letting of a contract, bidders would be likely to ask a higher price for the carrying of that single mail than they would for each of a larger number of

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mails on the same route within the same time. To provide for such a change, when just and expedient, section 817 of the Postal Regulations provides:

"The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in order to place on the route superior service, or whenever the public interests in his judgment shall require such discontinuance or curtailment for any other cause, he allowing, as full indemnity to the contractor, one month's extra pay on the amount of services dispensed with, and a pro rata compensation for the amount of services retained and continued."

This regulation is, in substance, incorporated in the instructions given by the Department to bidders for contracts, and constitutes a part of the contract when made. The regulations and instructions give full notice to the bidders and contractors that the Postmaster-General reserves to himself the power to discontinue a given *service* whenever the public interests in his judgment shall require it. The contracts made in pursuance of the regulation in the following clause substitutes the word "contract" for "service," as follows:

"It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this *contract*, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and in case of decrease, curtailment, or discontinuance of service, as full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor in demnify of month's extra pay for any change of service not involving a decrease of service."

This interpretation given by the parties to the word "service" as found in the regulation, in connection with the regulation, gives to the Postmaster-General the power to discontinue a contract when in his judgment the public interests require it. In the case of *Garfield v. United States* (93 U. S. R., 246), the Supreme Court of the United States, in con-

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straining a similar regulation of earlier date, speaking of the contractor, ruled :

"He no doubt knew that this regulation provided that the Postmaster-General could discontinue entirely the service for which he proposed, whenever in his judgment the public interests required it, and that for such discontinuance one month's pay was to be deemed a full indemnity to the contractor. There was reserved to the Postmaster-General the power to annul the contract when his judgment advised that it should be done, and the compensation to the contractor was specified."

Your inquiry is therefore, subject to the limitations contained in it, answered in the affirmative.

I am yours, respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

BATTERY ISLAND, MARYLAND.

Upon the facts presented touching the title to certain property at Battery Island, in the Susquehanna River, Maryland, occupied and used by the U. S. Fish Commission : Advised (1) that the legal title to such of the made land as is contiguous to the island is in the riparian proprietor; (2) that the legal title to such of the made land as is not contiguous to the island, but lies separate therefrom, is in the State of Maryland, also the title to the soil on which the public works (cribs, breakwaters, etc.) are constructed; (3) that the United States have no title to any land within the lines of said works or upon the island excepting the light-house site.

DEPARTMENT OF JUSTICE,
May 5, 1888.

SIR : I have had under consideration the communication of the Commissioner of Fish and Fisheries and other papers which were referred to me with your letter of the 18th ultimo, touching certain property on Battery Island, in the Susquehanna River, within the State of Maryland, situated about $3\frac{1}{2}$ miles below Havre de Grace, Md., and in compliance with your request now beg to submit my opinion as to whether the United States have a valid title to the whole or any part of the premises.

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Part of said island, comprising 2,025 square feet of ground, was purchased by the United States in 1852 for a light-house site, and is still used for that purpose. On examining the title papers relating thereto, I find that a patent covering the whole island (formerly called Edmonson Island or Shad Battery, and containing 1 or 2 acres only) was issued by the State of Maryland to Robert Gale and John Donohoe some time previous to the year 1835. In 1842 it was purchased by Otto Scott at a sheriff's sale, under an execution on a judgment against said Gale and Donohoe. The title of the United States to the light-house site is derived by deed from said Scott. The remainder of the island was leased by the Government from T. B. Ferguson in 1883 for a nominal rent (\$1 per annum), and has since been held under his lease, renewed from time to time; but for several years prior to 1883 it had been occupied for the purposes of the U. S. Fish Commission, with the permission of the owner, and it has since been occupied for the same purposes under the said lease.

During such occupancy a number of cribs, breakwaters, basins, and other works have been constructed by the Government, at great expense, in the waters immediately adjacent to the island and outside of its original boundaries. Within the lines of these works are several pieces of "made land," formed by deposits of earth obtained in dredging the channel leading to the island and otherwise, some of which are contiguous to and others separate and distinct from the island. And the question proposed I understand to relate to the soil on which the said works are constructed, including the pieces of made land referred to, and not to any soil lying within the original limits of the island.

In regard to the made land which is *contiguous* to the island, and which constitutes really a part of the latter as it now exists, the ownership thereof would seem to be in the proprietor of the land in front of which the same was formed. By an act of the Maryland legislature, passed in 1862, chapter 129 (see also Revised Code of Maryland, 1878, pp. 183, 184), the owner of land bounding on navigable waters is declared to be entitled to all accretions to said land by the recession of the water, whether formed or made by natural causes or otherwise, in like manner and to like extent as such right may be

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claimed by the owner of land bounding on water not navigable; and he is also declared to be entitled to the exclusive right of making improvements into the water in front of his land (saving only that no improvement shall be so constructed as to interfere with the navigation of the stream); and it is further declared that such improvements and accretions shall pass to the successive owners of the land to which they are attached as incident to their respective estates. The United States own no land on the island, excepting the light-house site hereinbefore mentioned, which, when purchased by the Government, was bounded on all sides by other land belonging to the vendor thereof, and its boundaries have since remained unchanged. Manifestly, then, the proprietorship of such site does not carry with it any rights under the said act.

With respect to the other made land, namely, that which is not attached to the island, and also the soil whereon the said works are constructed, I am of the opinion that the title thereto is in the State of Maryland. It is well settled that each State owns the land of all tide waters within its jurisdiction, unless they have been granted away. (*McCready v. Virginia*, 94 U. S. R., 391.) In the absence, therefore, of any grant by the State of Maryland imparting a right to the premises (and I am not advised that any such grant exists) the ownership thereof must be deemed to be in that State.

It will be observed that the law of Maryland cited above gives the riparian proprietor the exclusive right to make improvements in the water in front of his land. The construction of the public works already referred to in the immediate front of the island abridges somewhat the exercise of such right by its owner; but they were constructed there with the consent of such owner. There is believed to be no ground, legal or equitable, upon which he could maintain any claim to or respecting the same as against the Government.

The result reached by me may be summed up thus: (1) The legal title to such of the made land as is contiguous to the island is in the riparian proprietor. (2) The legal title to such of the made land as is not contiguous to the island, but lies separate therefrom, is in the State of Maryland; also the title to the soil on which the public works aforesaid are constructed. (3) The United States have no title to any land

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within the lines of said works or upon the island, excepting the light-house site.

The condition of the title to the property at Battery Island, occupied and used by the Fish Commission, here pointed out, may suggest the advisability, in order to avoid complications in the future and to adequately protect the public interests there, of acquiring for the United States the part of the island not already owned by them (containing about 1 acre) which is at present occupied by the Commission under the lease from Ferguson, and also of obtaining from the State a grant to the United States of the land belonging to the former within the lines of said works, together with a cession of jurisdiction over the whole of the property.

The papers received with your letter are herewith returned.

I have the honor to be, very respectfully,

Your obedient servant,

A. H. GARLAND.

The PRESIDENT.

COMPENSATION OF DISTRICT ATTORNEY.

Where a district attorney instituted proceedings for the forfeiture under section 5239, Revised Statutes, of "all the rights, privileges, and franchises" of a national banking association, by direction of the Solicitor of the Treasury, agreeably to section 380, Revised Statutes: Advised that the account of the district attorney for his services, upon approval thereof by the Attorney-General, may properly be paid out of the appropriation for the payment of miscellaneous expenses authorized by the Attorney-General.

DEPARTMENT OF JUSTICE,

June 14, 1888.

SIR: I have given careful attention to the question of authority to pay the claim of W. B. Burnet for services as district attorney in the judicial proceedings instituted by the Comptroller of the Currency under section 5239, Revised Statutes, for the forfeiture of "all the rights, privileges, and franchises" of the Fidelity National Bank, of Cincinnati, Ohio.

Section 380, Revised Statutes, provides as follows:

"All suits and proceedings arising out of the provisions of

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law governing national banking associations, in which the United States or any of its officers or agents shall be parties, *shall be conducted by the district attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury.*"

The proceedings in question were instituted under that section, by direction of the Solicitor of the Treasury, and were such as it was the duty of Mr. Burnet to conduct.

- District attorneys are compensated by fees and fixed salaries. Congress has in several sections of the Revised Statutes prescribed what fees shall be charged by them, and for what services, and by section 770 has declared that district attorneys are entitled to receive a salary at the rate of \$200 a year "*for extra services.*"

It is unnecessary to examine the several provisions of law relating to the fees of district attorneys, because Mr. Burnet admits that his claim does not come within any of them, nor do the services on which the claim is founded bear analogy to those named in the provisions of law mentioned, as the litigation in which they were rendered was not set on foot for the benefit of the Government of the United States, but for the benefit of the Fidelity National Bank, and possibly of the public in general.

Is the claim covered by the provision allowing him a salary of \$200 "*for extra services?*"

Undoubtedly the services rendered by Mr. Burnet were "*extra*" in the sense that they were not enumerated in any of the provisions of law relating to fees; but the words "*extra services*" have not been given so extended a sense by those charged with the duty of applying these laws. They have uniformly held that the "*extra services*" contemplated are certain duties of a minor character which the district attorneys are required to perform, but for which Congress has not seen fit to legislate severally as to compensation; but that services out of the ordinary run of official duties do not fall within the meaning of "*extra services*" as used in section 770.

That there are services in the view of Congress required by law of district attorneys, and not covered by any legislation as to the compensation of such officers, is shown clearly by the third section of the act 20th June, 1874 (18 Stat., 109),

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which, after declaring "that no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law," says, "*Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services *not covered by their salaries or fees.*"

I am entirely free from doubt that Mr. Burnet's services are not covered by the salary for "*extra services*" allowed by law, according to the settled interpretation of section 770, Revised Statutes.

I am of opinion, furthermore, that Congress intended that such services as Burnet's should be paid out of the appropriation to defray the expenses of the United States courts. In the appropriation for that purpose for the fiscal year ending the 30th June, 1888 (24 Stat., 542), is the following provision:

"For payment of such miscellaneous expenses as may be authorized by the Attorney-General, including the employment of janitors and watchmen in rooms or buildings rented for the use of courts, interpreters, experts, and stenographers; of furnishing and collecting evidence where the United States is or may be a party in interest, and moving of records, two hundred and fourteen thousand four hundred dollars."

In my opinion the Attorney-General's approval of Mr. Burnet's account would authorize its payment out of the appropriation for the payment of miscellaneous expenses authorized by the Attorney-General.

I do not think it necessary that the authority of the Attorney-General contemplated by the act should have been given before the service was rendered, but that it is enough if his approval or sanction is given after the service has been rendered. Any other view would produce great embarrassment and in some instances seriously obstruct the administration of justice, as all expenses cannot possibly be foreseen by the Attorney-General, and it would be a public inconvenience to stop judicial proceedings, for example, to afford

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time to make application to the Attorney-General. It seems to me, therefore, that it can hardly be supposed that Congress intended, by the use of the words "authorized by the Attorney-General," any more than that his approval of an expense should be necessary before it could be paid under the provision in question. In the case in hand, Mr. Burnet was required by law to perform the services in question when directed to do so by the Solicitor of the Treasury without the knowledge of the Attorney-General, and it must have been intended that services so required and rendered should be paid for, and my opinion is that Congress had in view that proper compensation in all such cases should be made out of the above-mentioned appropriation "for the payment of such miscellaneous expenses as may be authorized by the Attorney-General."

I do not see that your action is necessary in the present state of this business; but as the case stands without precedent in this Department, its extraordinary character might be a reason for sending it to the Treasury with your approval should you concur in my views.

I have the honor to be, very respectfully, your obedient servant,

WM. A. MAURY,
Acting Attorney-General.

The PRESIDENT.

COMMISSIONERS OF EMIGRATION, NEW YORK.

Under the act of August 3, 1882, chapter 376, and the contract made by the Secretary of the Treasury agreeably thereto with the commissioners of emigration of the State of New York, the latter are not bound to account for and pay over to the Treasury Department moneys received by them for privileges granted to individuals to transact in Castle Garden certain business with the immigrants there.

DEPARTMENT OF JUSTICE,
June 30, 1888.

SIR: Your letter of the 12th ultimo states that, pursuant to the provisions of the act of August 3, 1882, entitled "An act to regulate immigration," the Secretary of the Treasury, on the 27th of September, 1883, entered into a contract with the commissioners of emigration of the State of New York,

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under which the Treasury Department has allowed and paid from the immigration fund created by that act certain expenses incurred by the commissioners, including the sum of \$8,000 a year rent paid by them for Castle Garden, used as a landing place for immigrants.

During the continuance of such contract it appears that the commissioners have received considerable amounts of money for privileges granted by them to individuals to transact in Castle Garden certain business with the immigrants there—such as selling them food, railroad tickets, etc., changing their money, transporting their baggage, and the like—and that the money so received has not been accounted for at the Treasury Department.

You inquire whether, under the act and contract referred to, such money should be accounted for and paid over by the commissioners to that Department.

Upon examination of said act I find no provision therein which contemplates the collection of or accounting to the Treasury for any money other than the "duty of 50 cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port," etc., and with the collection of that duty the commissioners have nothing to do; nor do I find any provision in the said contract under which money is authorized to be collected by or paid to the commissioners, excepting such as shall be found due for necessary expenses incurred by them in the performance of the contract.

It seems that, in adjusting the accounts of the commissioners for expenses so incurred, the Treasury Department has heretofore allowed as part of these expenses the amount of the rent annually paid by them for Castle Garden. But this does not make the United States a lessee of the premises, or entitle it to the income derived from the use thereof for private business purposes under licenses given by the commissioners. The latter are officers of the State, and *in their capacity as such* are authorized to lease, and have leased, from the city of New York, for the purpose of a landing place for immigrants, what is known as Castle Garden. Their accountability is, I conceive, to the State for whatever money they may receive for grants by them of privileges to

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transact private business upon the premises so leased. Such funds cannot well be regarded as belonging to the United States.

I am accordingly of the opinion that the commissioners are under no duty, by the provisions of either the act or the contract referred to, to account for and pay over to the Treasury Department the money received by them for the purposes aforesaid.

I am, sir, very respectfully,

G. A. JENKS,

Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

The phrase "forgings of iron and steel," as used in clauses Nos. 163 and 167 (T. I., new), of the act of March 3, 1883, chapter 121, includes forgings made of iron and forgings made of steel, and is not limited to articles composed of both iron and steel combined in the same forging.

DEPARTMENT OF JUSTICE,
July 2, 1888.

SIR: By your letter of June 1, 1888, you ask for an expression of my opinion as to the true interpretation of clauses (T. I., new), Nos. 163 and 167 of the tariff act of the 3d of March, 1883, with reference to the phrase "forgings of iron and steel," which is used in both.

No 163 is: "Anvils [2½ cents per pound], anchors or parts thereof [2¼ cents per pound], mill-irons and mill-crankes of wrought-iron and wrought-iron for ships [2 cents per pound], and *forgings of iron and steel* for vessels, steam-engines, and locomotives, or parts thereof, weighing each twenty five pounds or more, two cents per pound."

Clause No. 167 is: "*forgings of iron and steel*, or forged iron, of whatever shape, or in whatever stage of manufacture, not specially enumerated or provided for in this act, two and one-half cents per pound."

The question is, does the phrase "forgings of iron and steel" limit the articles therein named to such as are composed of both iron and steel combined in the same forging,

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or does it embrace forgings made of iron and also forgings made of steel?

Very few, if any, of the articles named in clause No. 163 are ever made by a combination of the two metals. To interpret the phrase so as to limit it to such articles would render it almost if not quite nugatory, and leave nearly all the forgings used for the purposes set forth in the clause unprovided for by any specific provision as to the rate of duty. The law could hardly have been intended to provide for a possible few of the articles named, and leave almost the whole bulk of such products unprovided for. The same reason applies in a large degree to clause No. 167. The context of the phrase in this clause, "or forged iron, of whatever shape or in whatever stage of manufacture not specially enumerated or provided for," does not necessarily rebut the view that forgings of iron had been provided for by the previous phrase in the same clause. "Forged iron" is a much more comprehensive phrase than "forgings." It includes all iron that has been subjected to the process of forging. The last part of the sentence, "not specially enumerated or provided for," clearly contemplates that some forged iron had been specially enumerated or provided for. It is entirely consistent with the context to the phrase "forged iron," etc., that a specific part of the manufacture embraced in it had been provided in other clauses or phrases of the act. The phrase in clause No. 167 is identical with that in No. 163. They both deal with the same general subject. Consistency requires that they shall receive the same interpretation, if such interpretation can reasonably be given. There is no sufficient reason to the contrary. I am of the opinion that the phrase "forgings of iron and steel" should be interpreted in both clauses to include forgings of iron and also forgings of steel, and not alone to those in which the two metals are combined in the same forging.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Government Advertisements.

GOVERNMENT ADVERTISEMENTS.

Section 853, Revised Statutes, is superseded by the act of June 20, 1878, chapter 359, as regards the payment for advertisements by the several Departments of the Government.

DEPARTMENT OF JUSTICE,
July 3, 1888.

SIR: Your letter of the 15th ultimo has been received. It asked for the construction of the laws in force respecting advertisements in newspapers, referring to sections 853, 3823, and 3824, Revised Statutes.

Section 853 (act February 26, 1853) fixed printers' fees "for publishing any notice or order, required by law, or the lawful order of any court, Department, Bureau, or other person," except for ten States mentioned in sections 3823, 3824, and for other States, as in 3825, Revised Statutes. Section 853 included all possible legal notices or orders.

Section 3823 (act March 2, 1867) directed the Clerk of the House of Representatives to select certain newspapers in certain States, ten in number, to publish (1) the treaties and (2) the laws of the United States, in one or more of which papers the orders of a judge or court, or officers of the court or executive officer, "shall be published." It likewise included all possible legal notices or orders.

Section 3825 regulated the publishing of treaties and laws in all other States, without mention of publication of notices or orders "required by law" or the order of a court, so that section 853 had no force in the ten States and was of force in the others.

Section 3824 (act March 2, 1867) directed the Clerk to notify each head of a Department and each judge of the United States courts "of the papers selected by him;" directed the executive officers to publish in the papers selected; prohibited payment of publications or advertisements in other papers in said districts, and forbade every public officer to publish "otherwise than" thus provided.

The act of July 31, 1876, directed the publication of all treaties in only one newspaper in the District of Columbia, designated by the Secretary of State.

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The act of February 18, 1875 (18 Stat., 313), amended section 79, Revised Statutes, so as to read "after the 4th day of March, 1875, the publication of laws in newspapers shall cease."

The action of the Clerk of the House of Representatives under section 3823 was to provide for the publication of *treaties* and *laws* in newspapers, section 79 forbade the publication of laws in newspapers, and section 204 provided for their promulgation.

The act of July 31, 1876, provided for the publication of treaties in another manner.

The duties of the Clerk to publish the laws and treaties therefore ceased, and he was no longer required to act; therefore the injunction laid upon a court or a judge, an officer of court or an executive officer of the United States, by section 3823 (contingent upon the action of the Clerk) also ceased. Thus the sections 3823, 3824, and 3825 were repealed.

The act of June 20, 1878 (20 Stat.; 216), fixes the rates of all advertisements by the several Departments of the Government. It affected section 853, as it directed "That hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several Departments of the Government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise: *Provided*, That all advertising in newspapers since the 10th day of April, 1877, should be audited and paid at like rates; but the heads of the several Departments may secure lower terms at special rates whenever the public interest requires it."

The section covers advertisements that are executed by the marshals, who are executive officers, under the charge of and subject to the general supervision of the Department of Justice.

It is thus an expense in contemplation of law for the Department in that the costs of the advertising are paid out of funds distributed for the use of the United States Courts

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under the general supervision of the Department of Justice.

There seems to be, therefore, no printers' fees contemplated by section 853, that are not incurred for and paid by an Executive Department.

The facts that the courts direct the advertisements makes them none the less "an advertising required by law for the Department."

Section 853 is therefore superseded by the act of June 20, 1878, so far as the advertisements referred to in your letter are concerned.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

TAXATION OF INDIAN LANDS.

Lands entered and patented to Indians under the provisions of the act of March 3, 1875, chapter 131, before the act of July 4, 1884, chapter 180, became a law, are exempt from taxation for a period of five years from the date of the patent issued therefor.

The said act of July 4, 1884, is supplementary to the said act of March 3, 1875, and its provisions apply to all entries under the latter act for which patents had not issued when the former act took effect. Under the act of 1884 the lands entered are exempt from taxation for a period of twenty-five years from the date of the patent.

Under the act of January 18, 1881, chapter 23, for the benefit of the Winnebago Indians, the land entered is expressly exempt from taxation for twenty years.

Lands allotted to Indians under the provisions of the act of February 8, 1887, chapter 119, are exempt from taxation for twenty-five years.

DEPARTMENT OF JUSTICE,
July 27, 1888.

SIR: An opinion is asked by you on the question, "Whether lands entered by or allotted to Indians under the provisions of section 15 of the act of March 3, 1875 (18 Stat., 420), of section 5 of the act of January 18, 1881 (21 Stat., 315), of section 1 of the act of July 4, 1884 (23 Stat., 96), and of section 4 of the act of February 8, 1887 (24 Stat., 388), are subject to taxation during the period in which said lands are held in trust by the United States for the sole use and benefit of

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the Indians by whom such entries or to whom such allotments shall have been made."

The act of 3d March, 1875, chapter 131 (18 Stat., 420), enacts (section 15) that any Indian born in the United States and the head of a family or who has arrived at the age of twenty-one, and has abandoned or may hereafter abandon his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to make a homestead entry of public land under the general law, subject, however, to the following *proviso*:

"Provided, however, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor."

The act of 18th January, 1881 (21 Stat., 315), after reciting that a large number of the Winnebago Indians, of Wisconsin, have selected and settled in good faith upon homestead claims under section 15 of the act of 3d March, 1875 (*supra*), and have abandoned their tribal relations, and after providing among other things for cases in which certain of the said Indians are prevented by poverty from obtaining the benefit of the said act of 3d March, 1875 (*supra*), enacts (section 5):

"That the titles acquired by said Winnebagoes of Wisconsin, in and to the lands heretofore or hereafter entered by them under the provisions of said act of March third, eighteen hundred and seventy-five, shall not be subject to alienation or incumbrance, either by voluntary conveyance or by the judgment, decree, or order of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty years from the date of the patent issued therefor. And this section shall be inserted in each and every patent issued under the provisions of said act or of this act."

By the act 4th July, 1884 (23 Stat., 96), it is provided (section 1):

"That such Indians as may now be located on public lands,

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or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

The act of 8th February, 1887 (24 Stat., 389), authorizes the President to allot to Indians in severalty lands in any reservation on which their tribe or band may be settled, and in certain other cases to make allotments to Indians out of lands of the United States, and provides (section 5) :

"That, upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided,

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or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act."

The interesting feature of this legislation is that it marks a new epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore. It is dismemberment of the tribes and bands, and absorption, as citizens, of the individuals composing them by the States and Territories containing the lands on which such individuals settle or may be settled, that is the policy of this new legislation.

But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy. The legislation above mentioned deprives the Indian settler of the right of conveying or encumbering the land, in any way, for a period stated, or provides that it shall be held by the United States for a given time in trust for the sole use and benefit of the Indian, and, at the expiration of such time, be conveyed to him by patent.

That Congress has power to say that the Indian settler on the public lands in a State or Territory shall not be taxed as to his land, or that it shall not be aliened or encumbered in any way, is, I think, clear; for if the Indians, as communities, are under "the paternal superintendence of the Government" (6 Wheat., 588), or "in a state of pupilage," looking to our Government for protection, relying upon its kindness and its power, appealing to it for relief to their wants, and addressing the President as their great father (5 Peters, 17; 112 U. S. R., 99; 118 U. S. R., 384), and if the national legislation has tended more and more towards the education and civili-

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zation of the Indians and fitting them to be citizens (112 U. S. R., 106), it is not easy to comprehend why the guiding and protecting hand of the Government should be powerless to follow the Indian who has abandoned his tribe and resolved to live in a civilized community. It is true that the Indian who gives up his wild life has taken a great step in the direction of becoming a citizen, but his situation as a member of a civilized community exposes him to dangers which call for the fostering care and protection of the Government, without which the attempt to make him a useful citizen must fail necessarily. It is only after a considerable period of probation that he can be educated to understand the dignity and responsibilities that belong to citizenship and the ownership of property, and it is to protect him, while receiving this education, that Congress has placed the above-mentioned restraints upon his property rights. Say the Supreme Court of the United States in *Elk v. Wilkins* (112 U. S. R., 106): "But the question whether any Indian tribes, or members thereof, have become so far advanced in civilization that they should be *let out of the state of pupilage* and admitted to the privileges and responsibilities of citizenship is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself."

It is plain, then, that the Government must continue its "paternal superintendence" over the individual Indian who has become a freeholder in a State or Territory under the legislation above mentioned, or it should not be the means of introducing into such State or Territory so dangerous an element as the Indian must be who is put in the uncontrolled possession of property before he has got the mastery of the improvidence and instability that characterize him in his wild state.

Has Congress signified a purpose to withhold from State or Territorial taxation lands held under the above-named statutes? That is the question submitted for opinion.

The act of 1875 (*supra*) declares (section 15) that the Indian's title to land entered by him under that act "shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor."

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The act of 1884 (*supra*) extends the benefits of the homestead laws "to such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter so locate." This law requires that each patent issued under it shall declare that the United States will hold the lands entered for the period of twenty-five years in trust for the sole use and benefit of the Indian by whom the land was entered, or his widow and heirs in case of his decease, and that at the expiration of said period the United State will issue a patent to such Indian, or his widow and heirs, in fee, "*discharged of said trust and free of all charge or incumbrance whatsoever.*"

I am of opinion that this act of 1884 was intended to be supplemental to and somewhat in modification of the act of 1875, and that its provisions apply to all entries made under the act of 1875 for which patents had not issued at the time the act of 1884 went into effect. But all lands entered and patented under the act of 1875, before the act of 1884 became a law, are, I think, governed by the former act alone, and therefore alienable by the settler and subject to his liabilities after a period of five years from the date of the patent, there being no provision in the act of 1884 for recalling patents already issued under the act of 1875 and replacing them by others drawn in conformity to the act of 1884.

That the act of 1884 was intended to be supplemental to the act of 1875, and cover the same cases as that act, is further shown by its general reference merely to the power of the Secretary of the Interior under the act of 1875 to lay down the rules and regulations under which Indians desiring to enter public lands shall make proof of abandonment of their tribal relations.

It would be a great mistake to hold that the United States is an ordinary trustee of the lands entered by Indians under the act of 1875 and 1884, for it is in its sovereign character as the guardian and protector of the Indians, and in the performance of a high and sacred duty to them, the due execution of which is of great importance to the United States, that it assumes the relation of trustee; and the trust created by the act is nothing less than the means or instrumentality employed by the United States for the performance of that duty. Now nothing is better settled under the Constitution

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than that no State or Territory has power to lay a tax on a means or instrumentality used by the United States in the performance of a duty appertaining to that Government. Said Chief Justice Marshall in *Weston v. The City of Charleston* (2 Peters, 466): "The States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." (*McCulloch v. Maryland*, 4 Wheat, 316; *Osborn v. The Bank of the United States*, 9 Wheat, 738. See also *Railroad v. Peniston*, 18 Wall., 38, for a very full discussion of the subject.)

The case of the *United States v. The Nashville, Chattanooga and St. Louis Railway Company* (118 U. S. R., 120) has a direct bearing on the point now in hand. In that case it was held that the statute of limitations of Tennessee did not run against certain coupons cut from bonds of the defendant company during the time such bonds were held by the United States as trustee for certain Indians. The court says: "The money with which they (the bonds) were bought was money received by the United States from the sale of lands ceded to them by the Chickasaw Nation of Indians. Those lands, the money received from their sale, and the securities in which that money was invested, were held by the United States in trust, to be applied for the benefit of those Indians, in the performance of the obligation assumed by the United States by treaties with them. The securities were thus held by the United States for a public use in the highest sense, the performance of a *quasi* international obligation, and they continued to be so held until that obligation had been performed and discharged, after which they were held by the United States, like all other property of the Government, for the ordinary public uses." (Page 126.)

It is impossible to distinguish that case, in principle, from the one in hand, or to escape the conclusion that the course of reasoning that shows that the coupons were not affected by the State statute of limitations must necessarily lead to the exemption of the lands in question from State or Territorial taxation.

But, aside from this view, the words of the act of 1875 are

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sufficient to exempt the lands in question from taxation. It is true the term taxation is not used, but it would seem to be embraced necessarily by the declaration that the lands "shall not be subject to alienation or incumbrance," following which, to be sure, are the words, "either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor;" which words, it is easy to see, were used by way of illustration or example merely, and not to narrow the sense of the preceding general terms "alienation" and "incumbrance;" just as the old English statute declaring that a ship should not be deemed a wreck if "a man, a dog, or a cat" escaped alive, as to which words Lord Coke says, "for, besides these two kinds of beasts, fowls, birds, hawks, and other living things are understood, whereby the ownership or property of the goods may be known."

The intention of the act of 1875 being to provide a way for starting the Indian to live in a civilized way and educate him to be a good citizen, it would be a strange thing, indeed, to find that Congress had made its plan for that purpose dependent on the Indian's ability and disposition to pay the taxes assessed on his land. It is unnecessary to argue that such an interpretation would defeat the manifest intention of Congress, and involve the inconsistency of treating the Indian as helpless and dependent, and at the same time as able to take care of himself.

We pass now to the act of 1881 (*supra*), for the benefit of the Winnebago Indians. This statute contains, in addition to the provision of the act of 1875 against alienating and encumbering, the express declaration that the lands entered "shall not be subject to taxation of any character" for twenty years, thereby removing the question of immunity from taxation beyond the domain of argument. Congress has seen fit in this act not to leave to construction the exemption of the lands from taxation, but its explicit declaration in that respect in this subsequent law does not, it may be observed, impair, in my opinion, the argument above urged in favor of exemption from taxation under the act of 1875.

Passed Assistant Surgeons in the Navy.

I am also of opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

This disposes of the questions presented for my consideration.

I have the honor to be, sir, your obedient servant,

G. A. JENKS,
Acting Attorney General.

The SECRETARY OF THE INTERIOR.

PASSED ASSISTANT SURGEONS IN THE NAVY.

In the organization of the Medical Corps of the Navy a passed assistant surgeon and an assistant surgeon are officers of one and the same grade, but belong to different classes in such grade.

A passed assistant surgeon is simply an assistant surgeon who has been officially notified that he has passed successfully the examination necessary to be undergone before he can be appointed a full surgeon when a vacancy occurs.

DEPARTMENT OF JUSTICE,
July 31, 1888.

SIR: I have considered the questions presented by your communication of the 26th June ultimo, namely, whether passed assistant surgeons represent "a separate and distinct grade," whether the incumbent of the office of passed assistant surgeon must be appointed and commissioned by the President, with the advice and consent of the Senate, and whether there must be a further examination of passed assistant surgeons before promotion to the grade of surgeon." As the last two are necessarily involved in the first, it is only necessary to determine whether there exists in the naval organization the grade of passed assistant surgeon.

Section 1368, Revised Statutes, provides that "The active list of the Medical Corps of the Navy shall consist of fifteen

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medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons."

This section was supplanted by a provision in the act of 5th August, 1882 (22 Stat., 285), which is in these words: "That the active list of the Medical Corps of the Navy shall hereafter consist of fifteen medical directors, fifty surgeons, and ninety assistant and passed assistant surgeons."

We will first consider the law with regard to passed assistant surgeons as it stood before the act of 5th August, 1882 (*supra*), was passed, and then consider the effect of that law.

In the chapter of the Revised Statutes which provides for the organization of the Navy no mention is made of passed assistant surgeons except to declare (section 1375) that a surgeon, assistant surgeon, or *passed assistant* surgeon may be detailed as assistant to the Bureau of Medicine and Surgery, which, although not by any means conclusive, goes far to show, in the absence of a clear manifestation of a contrary purpose in some other chapter, that Congress did not intend to establish any such grade, but that, as under the law in force at the time of the revision, there should be under the grade of assistant surgeon two *classes*, namely, assistant surgeons and passed assistant surgeons; and accordingly we find, passing from the chapter on organization to that on rank and precedence, that in dealing with the subject of relative rank passed assistant surgeons are declared entitled to the relative rank of lieutenant or master, while assistant surgeons are entitled to the relative rank of master or ensign (sec. 1474, Rev. Stat.); and passing to the chapter on pay, emoluments, and allowances, we see that a higher rate of compensation is given passed assistant surgeons than assistant surgeons (sec. 1556, Rev. Stat.), thus recognizing, it would seem, two classes under the simple grade of assistant surgeon.

Looking now for guidance in analogous legislation, we find that in the chapter on the organization of the Navy special provision is made for the *grade* of passed assistant paymaster (sec. 1376), for it is expressly declared (sec. 1377) that "until the number of passed assistant-paymasters shall have been reduced below thirty there shall be no promotion to

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that *grade*, nor any appointment to the grade of assistant-paymaster," and section 1380 provides that passed assistant-paymasters shall be regularly *promoted* and *commissioned* from assistant paymasters and paymasters from passed assistant-paymasters, subject to such examinations as may be prescribed by the Secretary of the Navy." Again, section 1383 provides that every paymaster shall give a bond in the sum of \$25,000, every passed assistant paymaster in the sum of \$15,000, and every assistant paymaster in the sum of \$10,000.

In the Corps of Engineers likewise we find (secs. 1390, 1392, chapter on organization) that Congress has established the grade of assistant engineer and the grade of passed assistant engineer in terms equally clear.

Now, it is natural to look for the same particularity of enactment in the case of passed assistant surgeons, if it had been the purpose of Congress in adopting the Revised Statutes to make them a distinct grade instead of a mere classification under a grade. But no such legislation is to be found.

There is nothing in section 1480, Revised Statutes, militating against the conclusion I have reached. The reference in that section to "the *grades established*" in the six preceding sections for the staff corps of the Navy is the identical language of the ninth section of the act of March 3, 1871 (16 Stat., 536), which refers to the previous sections of that act, in which grade and relative rank in the staff department of the Navy *are created together uno flatu*; whereas in the Revised Statutes the two subjects are treated in *distinct chapters*. This effectually disposes of the argument that there was any establishing of grades in the sections assigning relative rank; the mistake of the revisers in using the expression "grades established" being too evident to admit of doubt. Besides, it would be taking an unwarrantable liberty with the language of the law to deduce from the use of the expression "grades established," in the regulation of a matter merely ceremonious, an intention to make a change in the organization of the Medical Corps of the navy.

Indeed, the case of passed assistant surgeons, under the Revised Statutes, was precisely similar to that of passed midshipmen under the old law. That law recognized no such

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grade as passed midshipman. Midshipman was the *grade*, and passed midshipmen merely a "class." Hence, the act of March 3, 1845, section 4 (5 Stat., 794), declares that "no more than one hundred and eighty passed midshipmen, and those senior in rank, shall at the same time receive the pay fixed by law for that *class of officers*." But the act of 1806, which was still in force when the act of 1845 took effect (2 Stat., 390), organizing the Navy, declared "that the officers shall not exceed the following numbers and *grades*; that is to say, thirteen captains, nine masters-commandant, seventy-two lieutenants, and one hundred and fifty midshipmen." * * *

It may be added, that passed midshipmen received more pay than midshipmen, just as passed assistant surgeons are entitled to more pay than assistant surgeons.

It seems very clear, then, that as the law stood at the time the act of August 5, 1882 (*supra*), was passed, there was no such *grade* in the Navy as that of passed assistant surgeon.

It remains to consider what effect the act of 1882 had on the legislation preceding it.

As we have seen, that act provides, "That the active list of the Medical Corps of the Navy shall hereafter consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and ninety assistant and passed assistant surgeons."

In this provision—that is, to the extent of its relevancy to the subject in hand—I see nothing more than an intention to cut down the number of assistant and passed assistant surgeons. And to deduce any thing more, especially any thing so radical as a change in the organization of the Medical Corps, by establishing a new grade, would be, in my opinion, to take an unwarrantable liberty with the language of the statute.

The view we have taken derives no little support from the fact that in the analogous legislation with reference to assistant paymasters and engineers the number of each is defined by law (secs. 1376, 1390, Rev. Stat.), whereas there is no such regulation touching assistant and passed assistant surgeons, further than the declaration that the two together shall not make a greater number than ninety. And it may be added, as a fact authentically made known to me, that under the practice of the Navy Department the death, resignation, or

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promotion of a passed assistant surgeon makes no vacancy of itself alone calling for the promotion of an assistant surgeon. A passed assistant surgeon is simply an assistant surgeon who has been officially notified that he has passed successfully the examination necessary to be undergone before he can be appointed a full surgeon when a vacancy occurs.

This reasoning is strongly confirmed by the Supreme Court in *United States v. Moore* (95 U. S. R., 760), where it was held that a nomination by the President and confirmation by the Senate were not necessary to make a passed assistant surgeon out of an assistant surgeon, a position that could not have been taken if there had been such a grade as passed assistant surgeon.

I am happy to know that the conclusion I have reached is in harmony with the interpretation and practice of the Navy Department.

I am, sir, your obedient servant,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

SEIZURE OF CATTLE IN INDIAN TERRITORY.

In the case of a seizure of cattle in Indian Territory, alleged to be in violation of the treaties between the Cherokee Nation and the United States: *Advised* that the complainant should seek redress not by application to the executive, but to the judicial department of the Government, the courts of the United States for the western district of Arkansas having full jurisdiction of the subject-matter.

DEPARTMENT OF JUSTICE,
August 1, 1888.

SIR: I have considered your communication of the 5th July, 1888, asking my opinion as to the validity of certain legislation of the Cherokee national council in connection with the complaint of C. M. McClellan, who claims that the legislation in question is null and void, and that the seizure of his cattle by virtue thereof is in violation of the treaties between the Cherokee Nation and the United States, and of the Constitution of the United States, and asks the

Seizure of Cattle in Indian Territory.

action of the executive department for the purpose of securing redress from the Cherokee Nation.

The question propounded is essentially judicial, in view of the fact that the courts of the United States for the western district of Arkansas have full jurisdiction of the subject-matter by virtue of the thirteenth article of the treaty of the 19th July, 1866, between the United States and Cherokee Nation of Indians (Rev. Ind. Tr., 91) empowering the United States to establish a court or courts in the territory of the said nation; and of article 12 (paragraph 3) of the same treaty (*ib.*, 91), providing that the council of said nation shall enact no law inconsistent with the Constitution of the United States or laws "of Congress authorizing treaty stipulations with the United States;" and of section 533 Revised Statutes, which includes within the western judicial district of the United States for the State of Arkansas "the country lying west of Missouri and Arkansas known as the Indian Territory;" and of section 563 Revised Statutes, paragraph 12, which gives the United States district courts jurisdiction of "all suits at law or equity authorized by law to be brought by any person to redress the deprivation * * * of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof;" and of section 629 Revised Statutes, paragraph 16, investing the circuit courts of the United States with a jurisdiction similar to that conferred on the district courts by section 563 Revised Statutes; and of section 1977, Revised Statutes, securing to persons within the jurisdiction of the United States the same benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, etc.

If Mr. McClellan has been deprived of any right secured to him by the Constitution, by the laws, or by the treaties of the United States, he should invoke the judicial power of the Government, which is ample for his purpose.

The mistake of Mr. McClellan in applying to the executive branch of the Government is in supposing that the United States stand towards the Cherokee Nation as towards an independent power; but such is not the case.

Bond of Disbursing Officer in the Navy.

The Cherokee Nation has by its own agreement, as we have seen, come under the jurisdiction of the United States courts, and to the extent in which it has done so redress must be sought through those courts against members of the nation who have violated the rights of others.

I have the honor to return the papers that accompanied your communication of the 5th July, as requested.

I am, sir, your obedient servant,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

BOND OF DISBURSING OFFICER IN THE NAVY.

The Secretary of the Navy has power, under section 1383, Revised Statutes, to approve a pay-officer's bond in which the sureties are corporations, or a corporation joined with a natural person, if he deems such sureties sufficient.

DEPARTMENT OF JUSTICE,

August 2, 1888.

SIR: Your communication of the 26th July submits for opinion whether the Secretary of the Navy has power to approve a pay-officer's bond in which the sureties are corporations created by State authority, or in which one or more such corporations may be joined as surety or sureties with a natural person.

Section 1383, Revised Statutes, requires that a pay-officer "shall, before entering on the duties of his office, give bond, with two or more sufficient sureties, to be approved by the Secretary of the Navy, for the faithful performance hereof."

I see no reason why you should not approve a pay-officer's bond having corporations solely, or in combination with natural persons, as sureties.

The question of the surety's sufficiency is, under the law, for you alone to determine, and where a corporation is tendered as surety, that question involves the further question for your determination whether such corporation has the power under its charter to enter into the obligation.

It is the sufficiency of the sureties that the law looks to,

Effects of a Decedent on Naval Reservation.

and it does not concern itself any further. To say that it requires also that the surety shall be a natural person is to refuse the language of Congress its ordinary meaning, there being nothing to justify the conclusion that Congress intended the word "sureties" to be taken in a narrower sense.

I do not see that the question presented is affected by the fact that a bill has been introduced in Congress authorizing the Secretary of War to accept "the bond of an incorporated guaranty company for the faithful discharge of the duties of any disbursing officer of the Army."

I have the honor to be, sir, yours, very respectfully,

G. A. JENKS,

Acting Attorney-General.

The SECRETARY OF THE NAVY.

EFFECTS OF A DECEDEDENT ON NAVAL RESERVATION.

Where a resident on the naval reservation at Pensacola, Fla., died intestate, possessed of certain property, which is in the hands of the commandant of the yard: *Advised* that the local probate court of the State may properly exercise jurisdiction over the case, and that on the appointment thereby of an administrator of the estate of the deceased the property in the hands of the commandant belonging to such estate should be turned over to the administrator.

DEPARTMENT OF JUSTICE,

August 4, 1888.

SIR: Your letter of the 1st instant presents the following case: One John L. Ahearn, late a resident on the naval reservation at Pensacola, Fla., died intestate, in the year 1885, possessed of certain property, consisting of two frame houses on the reservation, a \$500 Government bond, now in the custody of Mr. C. McK. Oertung, a resident of Pensacola, and also some interest coupons and a small amount of cash, now in the official safe at the yard. The deceased was not at the time of his death an employé of the Government. Hereupon a question has arisen as to the proper disposition of his effects, and you ask advice on this subject, in order that the commandant of the yard, who has control of the reservation, may be instructed concerning his duty in the premises.

Settlement of Accounts.

Upon consideration I think the case is one over which the local probate court of the State may properly exercise jurisdiction, and that such jurisdiction should be invoked for the appointment of a curator or administrator of the estate of the deceased under the State law. On such appointment being made, the curator or administrator would be entitled to the custody of the property in the hands of Oertung belonging to the estate, and that in the hands of the commandant of the yard could lawfully be placed in the same custody. It is not to be doubted that the rights of all who may be interested in the estate will be fully protected by the local court.

I return herewith the papers which accompanied your letter.

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

SETTLEMENT OF ACCOUNTS.

The Secretary of the Treasury can not legally, by departmental order, change a practice or course of office prescribed by statute for the settlement of accounts.

DEPARTMENT OF JUSTICE,
August 4, 1888.

SIR: Your letter of the 12th ultimo has been received, in which you ask whether or not under existing practice the accounts of the officers of courts, United States attorneys, etc., can be settled through one bureau of the Treasury Department or not, and "whether the Secretary of the Treasury has authority under the statutes, by departmental order or regulations, to change the existing practice in this Department with regard to the settlement of certain accounts."

The First Auditor of the Treasury details the existing practice and recommends a change.

The Commissioner of Customs finds that there is a serious difficulty in the course suggested by the First Auditor, and is of the opinion that such a course can not be adopted without further legislation.

Settlement of Accounts.

The accounts of the officers mentioned, it is suggested by the Commissioner of Customs, must, under sections 269, 317, and 377, Revised Statutes, be settled by the First Auditor, the First Comptroller, and the Commissioner of Customs. To these statutes may be added the act of February 22, 1875, section 1 of which directs that the original accounts and vouchers of the officers mentioned, when approved by the court, shall be forwarded by the clerk of the court "to the proper accounting *officers* of the Treasury." This section, with those cited by the Commissioner of Customs, points out the legal way of auditing and adjusting the accounts.

The First Auditor says that the change proposed "can mostly be reached by departmental action."

A change of statute can not be made by any departmental regulation.

However "illogical" the practice under the laws may be, the laws authorize and enjoin such practice, and a deviation from a practice thus established can not be justified under the decisions of the Supreme Court of the United States (12 Wheat., 205, 210; 15 Peters 141, 145; 8 Wall., 335; 23 Wall., 374, 382; 95 U. S. R., 760, 763; 99 U. S. R., 265, 269; 107 U. S. R., 402, 406; 111 U. S. R., 471, 465; 113 U. S. R., 563), which sustain the doctrine that a contemporaneous and uniform interpretation by executive officers, charged with the duty of acting under a statute, is entitled to great weight, and *ought not to be overturned*—particularly applicable in cases that have been settled by construction, by precedent, by continuous practice, and the decisions of the court.

I am of the opinion, therefore, that so far as the contemplated changes are inconsistent with existing law, the Secretary of the Treasury can not legally by departmental order change a practice or a course prescribed by statute.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Choctaw Citizenship.

CHOCTAW CITIZENSHIP.

Claim of James Bragg to citizenship in the Choctaw Nation of Indians reconsidered; and *advised* that upon the record of the case as now made up he is entitled to such citizenship. Opinion of March 1, 1888 (*ante*, p. 110) cited.

DEPARTMENT OF JUSTICE,

August 31, 1888.

SIR: Yours of the 10th instant, with inclosures, received. You again submit the papers in the claim of James Bragg to citizenship in the Choctaw Nation of Indians, "with the original petitions of divorce of both Bragg and his wife," with the indorsements thereon, and request an opinion upon the question, "Is James Bragg entitled to Choctaw citizenship on the record as now made up?"

The Attorney-General, in an opinion dated March 1, 1888, says upon the question now resubmitted:

"The record in the divorce case is not before me. Whether it shall be conclusive as evidence or not must be determined from the record. If the proceedings in the divorce are regular, the allegations are sufficient and the decree final; the granting of the divorce to the wife establishes that she had just cause for separation from her husband." * * *

The petitions in the divorce case now transmitted materially change the status of James Bragg and Ellen Bragg as to the facts.

There is now placed before the Attorney-General what purports to be the record in the divorce case for the purpose of supplying the omission adverted to in the former opinion.

The additional transmittals consist of (1) the petition of Ellen Bragg, filed with the circuit clerk of Tobucksy County, in the first judicial district of the Choctaw Nation, on the 7th day of December, 1876, in which she asks a divorce from James Bragg for alleged non-support. An indorsement on back of petition shows that the case was dismissed with the consent of plaintiff's attorney on the 5th day of December, 1877, without notice having been given to the defendant of the pendency of the suit. (2) A petition of James Bragg, filed in the same court on the 5th day of December, 1877, in which he prays for a divorce from Ellen Bragg for the

Choctaw Citizenship.

alleged reason that she had married one Dick Nail and had lived with him as his wife. The record does not disclose that the defendant was ever served with a summons to appear and answer the allegations of the petition, and so far as the record shows no appearance or answer was ever made by the defendant. There is an indorsement on the back of the petition as follows: "Granted this 5th day of December, 1877."

The petitions and indorsements are certified by the clerk of the court as true copies. This is a statement, in substance, of all there is of the record in the divorce case as now submitted. This record does not, in my opinion, furnish sufficient evidence under the rule announced by the Attorney-General in his former opinion in this case to establish the fact that James and Ellen Bragg have been divorced at a proper hearing and by a final decree of a court having jurisdiction of the parties.

The law of the Choctaw Nation requires something more than an unsigned endorsement on the back of a petition to divorce man and wife.

In the laws of the Choctaw Nation, printed at Doaksville, in 1882 (page 28), will be found an act approved October, 1840, which provides the manner in which the records of trials in the district courts shall be kept. No such record has been furnished as evidence among the papers submitted. The law reads as follows:

AN ACT.—Clerks and judges to keep record of the courts.

"SEC. 5. *Be it enacted, etc.* That from and after the passage of this act each clerk of the several districts shall be furnished with a large blank book out of the district funds, to keep a correct record of all the proceedings of the several courts in his own district.

"*And be it further enacted,* That the judges in the several districts of each court shall furnish the district clerk in their respective districts with a full copy of all trials under his jurisdiction, with his name signed to it, which bill shall be filed and put on record.

"Approved October, 1840."

There may be deduced from the record as now submitted the following conclusions:

First. If there is a legal record of the proceedings upon the

Certificate of Sufficiency of Bondsmen.

petition of James Bragg, and there is included therein a final decree of divorce, and the finding of the court was based upon the allegations of the petition, in which just provocation is sufficiently averred, then James Bragg is entitled to Choctaw citizenship.

Second. If James Bragg has not been legally divorced from his Indian wife, Ellen Bragg, and in my opinion the record adduced is not sufficient to establish such final and legal decree, then he remains the husband of Ellen, and by reason thereof he is entitled to Choctaw citizenship.

Upon the record as now made up I am of the opinion that your question must be answered in the affirmative.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

CERTIFICATE OF SUFFICIENCY OF BONDSMEN.

There is no law requiring a United States judge or a United States attorney to certify as to the sufficiency of guarantors or bondsmen offered in connection with proposals and contracts with the Navy Department, and no fees are chargeable against the Government for such service.

The expense of obtaining a certificate from the office must be borne by the bidder or contractor as other expenses are incurred by him in the proper execution of the papers.

DEPARTMENT OF JUSTICE,
September 7, 1888.

SIR: Yours of the 3d instant has been received. You request information concerning a custom in your Department requiring the sufficiency of guarantors and bondsmen, offered in connection with proposals and contracts to and with the United States, to be certified by the United States judge or United States attorney of the district in which the parties reside; and whether under existing law a fee may be required for performing the service described, and if so, what amount may be demanded by the officer rendering the services.

In reply, I have to say that I fail to find any law that imposes the duty upon either the United States judge or

Vessels of Coast and Geodetic Survey.

United States attorney to perform the service, and this being so there is no fee prescribed by law. If a United States judge or United States attorney performs the service the same is an unofficial act and carries with it no official obligation or responsibility. No doubt this is the view taken by the United States attorney when he charged for his services.

If, therefore, these certificates are required by your Department for its protection in relation to proposals and contracts, the compensation for making the same is a matter to be settled between the contractor and the officer, and the expense must fall upon the bidder or contractor in the same way that other expenses are incurred by him in the proper execution of the papers.

The amount of the fee must be determined by contract made between the United States attorney and the contractor, or, in the absence of a contract, by the extent and value of the services rendered in the necessary searches and examination.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

VESSELS OF COAST AND GEODETIC SURVEY.

The shipping commissioners act of June 7, 1872, chapter 322 (Title 53, Merchant Seamen, Revised Statutes), has no application to seamen employed on vessels engaged in the service of the Coast and Geodetic Survey.

DEPARTMENT OF JUSTICE,
September 13, 1888.

SIR : I may answer all the questions submitted for opinion in your communication of 15th August, 1888, by saying that I am satisfied that the shipping commissioners act of 7th June, 1872 (17 Stat., 262), now embraced by Title 53, Merchant Seamen, Revised Statutes, has no application whatever to seamen employed on vessels engaged in the service of the Coast and Geodetic Survey. The act in question is expressly limited to the Merchant Marine of the United States.

It would seem to have been the intention of Congress that

Timber Depredations on Indian Lands.

the seamen employed on vessels in the Coast and Geodetic Survey should be taken from the regularly enlisted seamen of the Navy, and section 4685, Revised Statutes, which authorized the President in executing the provisions of law, under the title Coast Survey, "*to employ all persons in the land or naval service of the United States.*" Seamen employed under this section would, of course, be governed by the articles for the government of the Navy of the United States (Rev. Stat., 1624) just as if serving on a vessel of war.

It was in entire harmony with the plan requiring officers of the Army and Navy and vessels of the United States to be employed in prosecuting the work of the Coast and Geodetic Survey (Rev. Stat., 4684) for Congress to direct that seamen of the Navy should also be employed in that service.

This, I apprehend, disposes of all the questions submitted.

I have the honor to be, sir, your obedient servant,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

TIMBER DEPREDATIONS ON INDIAN LANDS.

The cutting or destroying of timber on lands which have been patented to individual Indians is not an offense punishable under the act of June 4, 1888, chapter 340, amendatory of section 5388, Revised Statutes.

DEPARTMENT OF JUSTICE,
September 21, 1888.

SIR: Your communication of the 2d August, 1888, asking an opinion as to whether the act of Congress entitled "An act to amend section fifty-three hundred and eighty-eight of the Revised Statutes of the United States in relation to timber depredations," approved 4th June, 1888, applies to lands for which individual Indians have received patents under treaties between the tribes to which they belonged, when the treaties were respectively made, and the United States.

As the question submitted has reference to lands in Washington Territory held by Indians under patents from the

Timber Depredations on Indian Lands.

United States, I shall confine myself to those lands and the law regulating the tenure thereof.

The act of Congress upon which the question submitted arises provides:

"That section fifty-three hundred and eighty-eight of the Revised Statutes of the United States be amended so as to read as follows: 'Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court.'

The letter of the Acting Commissioner of Indian Affairs, which accompanied your communication, states that the timber lands in question are held in severalty by Indians under patents from the United States.

These patents were issued under the treaties referred to and quoted in presenting the question submitted for my consideration.

The effect of this action under these treaties and of the act of Congress of the 8th February, 1887 (24 Stat., 390), entitled "An act to provide for the allotment of lands in severalty on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," was no doubt to sunder the tribal relations of the Indian allottees and place them under the protection of State or Territorial law, as the case might be, and, where the allottee was born within the territorial limits of the United States, make him a citizen of the United States.

Of this there can be no room for controversy under the act of 8th February, 1887, to say nothing of the treaties already mentioned, with which the statute is largely concurrent. The sixth section of the act provides as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member

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of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property."

Inasmuch, then, as lands held as above, by Indian allottees, can not be called, properly, *Indian reservations*, a term which Congress has clearly used to indicate those tracts or bodies of land set apart from the public domain for the occupation of Indian communities at the pleasure of the United States, but without any purpose to invest the occupants with more than a right of possession, and inasmuch as the lands covered by the statute are not "lands belonging to or occupied by any tribe of Indians under authority of the United States," the cutting or destroying of timber on land which is thus held in severalty by one who is clothed with the right of citizenship and protected by and subjected to all the laws, civil and criminal, of the Territory in which the land lies, is not an offense punishable under the act of Congress of the 4th of June, 1888.

I am, yours, respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

Transfer of Contract.

TRANSFER OF CONTRACT.

A manufacturing company, after having entered into a contract with the Navy Department to deliver a large quantity of steel castings to be used in the construction of an armored cruiser, proposed to transfer the contract to another manufacturing company, which contemplated fulfilling the covenants of the former company with the Government, and asked the approval of such transfer by the Secretary of the Navy: *Advised* that, in view of the prohibition in section 3737, Revised Statutes, the proposed transfer can not lawfully be approved and recognized by the Navy Department.

DEPARTMENT OF JUSTICE,
October 20, 1888.

SIR: By your letter of the 17th of October, 1888, you state that the Pittsburgh Steel Casting Company, by its contract of the 20th of June, 1888, secured by bonds for its performance, agreed to deliver to the United States about 140 tons of steel castings, to be used in the construction of the armored cruiser *Maine*; that that company asks your approval of a proposed assignment or transfer of the contract to the Standard Steel Casting Company; which last company joins in the request, and contemplates fulfilling the covenants of the former company with the Government. You inquire:

“*First.* Whether the transfer requested as above stated can or can not lawfully be approved and recognized by the Department.

“*Secondly.* If such transfer can lawfully be approved and recognized by the Department, may it accept a bond, with sufficient sureties, to be furnished by the Standard Steel Casting Company, in lieu of the bond heretofore given by the Pittsburgh Steel Casting Company and which accompanies its said contract of June 20, 1888?”

Section 3737 of the Revised Statutes provides:

“No contract, or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States.”

Transfer of Contract.

The first clause of this section forbids the transfer of this contract. The second clause declares that the effect of the transfer, when made in violation of the first clause, shall be an annulment of the contract as to all rights and covenants which are beneficial to the assignor. The third clause reserves the rights of action to the United States for any breach by the contractor. The general intent of the law is to forbid such assignments. In order to make it the interest of those who contract with the Government to obey the prohibition, and also to protect the United States against loss when assignments are made, it declares that assignors shall still remain subject to all obligations entered into and liabilities incurred under the contract, but shall be deprived of all legal rights thereunder as against the United States. Thus the parties to an assignment may suffer damage, but can derive no benefit from an assignment of a Government contract. There is no authority given by the statute, nor to be inferred from it, that any officer of the United States can, in advance, either approve or recognize any proposed assignment thus forbidden. It is true, as stated by Attorney-General Devens, the statute "is intended only for the benefit of the United States," but to secure integrity of administration and equal justice, rights, and privileges to all is a benefit contemplated by it. One of the purposes of the law was to secure integrity in bidding for contracts, by preventing a bidder or contractor from making several bids, one by himself and others by his friends and employés, to be afterwards consummated by assignments of the contract by them to the real bidder, for whom they all acted. Another was to prevent those who bid for and obtain contracts for mere speculation, and who have neither the intention nor the ability to perform them, from selling the contracts at a profit to bona fide bidders or contractors.

Without further illustration as to the purposes of the law, it is sufficient that Congress regarded it as necessary and expedient. And as stated by Justice Matthews in the case of *St. Paul Railroad v. United States* (112 U. S. R., 737): "The transfer, by the same proceeding, of the contract itself, so as to entitle the assignee to perform the service and claim the compensation stipulated for, is forbidden by Revised Statutes,

Issue of New Land Patents.

3737, which provides that 'no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred so far as the United States are concerned.'" The explicit provisions of this statute do not require any comment. No explanation could make it plainer.

Both your inquiries are therefore answered in the negative.

I am, respectfully, yours,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

ISSUE OF NEW LAND PATENTS.

In the case of a voidable entry of public land upon which a patent has already issued, where the action of the board of equitable adjudication is applied for with a view to obtaining the issue of a new patent by the Commissioner of the General Land Office under section 2456, Revised Statutes, a surrender of the outstanding patent should accompany the application or be made before the entry is acted upon by the board. The outstanding patent, when surrendered, need not be canceled until after confirmation of the entry; it is sufficient if the cancellation take place previously to the issue of a new patent.

DEPARTMENT OF JUSTICE,

October 22, 1888.

SIR: I have the honor to return herewith a list of fifteen private cash entries of public lands made at the Marquette land office, in the State of Michigan, which was referred to me by the Secretary of the Interior, in a letter dated the 9th of November last, for consideration and concurrent action.

It appears that these entries are voidable, and, having been for that reason submitted to the Commissioner of the General Land Office for the action of the board of equitable adjudication thereon under the law relating to suspended land entries, are by him approved and recommended to that board for cancellation. It also appears that the same entries had all been patented previously to their submission to the Commissioner, and that the outstanding patents have not as yet been surrendered. And the Secretary in his letter expresses the opinion that the entries should not be confirmed by the

Issue of New Land Patents.

board, and furthermore that the Commissioner had no authority to lay them before it.

The case here presented is governed by section 2456, Revised Statutes, which reads as follows: "Where patents have already been issued on entries which are confirmed by the officers who are constituted the board of adjudication, the Commissioner of the General Land Office, upon the cancelling of the outstanding patent, is authorized to issue a new patent on such confirmation to the person who made the entry, his heirs, and assigns."

This provision, which is taken from the second section of the act of March 3, 1853, chapter 152, does not in terms require either the cancellation or the surrender of the outstanding patent before confirmation of the entry by the board, though it plainly contemplates not only such confirmation, but the surrender and also the cancellation of such patent before the Commissioner is authorized to issue a new patent. Under the act of 1853 the outstanding patent was required to be surrendered previously to confirmation of the entry by the board. This is shown by the provision thereof giving authority to confirm, which confers it only upon those officers who constitute the board of adjudication "at the time of such surrender." But that act did not call for cancellation of the patent prior to confirmation of the entry by the board. Such cancellation was, indeed, thereby required before the Commissioner could issue a new patent on the confirmation of the entry by the board, but the confirmation of the entry might lawfully take place prior to the cancellation of the patent.

Although the surrender of the outstanding patent in advance of the action of the board upon the entry is not in terms required by section 2456 of the revision, as was the case in the act of 1853, yet such a requirement is entirely compatible with the language of that section; in view of which it may fairly be presumed that the practice established by the act of 1853 touching such surrender was not meant to be disturbed by the revision.

It is my opinion that in the case of an entry of the above character upon which a patent has already issued, where the action of the board of equitable adjudication is applied for

ARREARS OF PENSION.

with a view to obtaining the issue of a new one by the Commissioner under section 2456, Revised Statutes, a surrender of the outstanding patent should accompany the application, or at least occur before the entry is acted upon by the board; that such patent, when surrendered, need not be canceled until after confirmation of the entry; and that it is sufficient if the cancellation thereof be done previously to the issue of a new patent by the Commissioner.

I accordingly concur in the view expressed by the Secretary in so far as it affirms the requirement of the outstanding patent before action on the entry by the board, and differ therefrom only as regards the cancellation of the patent, holding that this may take place after such action is had.

I am, sir, very respectfully,

A. H. GARLAND.

THE SECRETARY OF THE INTERIOR.

ARREARS OF PENSION.

Where an application for a pension was made by letter, sufficient to identify the claimant and the claim, and was placed on file as a part of the record of the case before July 1, 1880, and the claim was not abandoned, but delay in its prosecution satisfactorily accounted for by sickness: *Advised* that (the claim being subsequently established and allowed) such application by letter is sufficient to warrant the granting of arrears of pension provided for by section 2 of the act of March 3, 1879, chapter 187.

DEPARTMENT OF JUSTICE,

October 23, 1888.

SIR: I received your letter of the 27th of September, 1888, in which you ask—

“Whether an application of a pension claimant made by a written communication or letter stating his claim, acknowledged and filed as an application by the Pension Office duly numbered in its order, should be treated as an application for pension under the proviso of the second section of the act of March 3, 1879, in a case where the declaration, subsequently required by the Office according to usual practice, was not filed, owing to sickness of the claimant, until after the 1st day of July, 1880, but the pension was subsequently duly

ARREARS OF PENSION.

proved and allowed. Should the applicant be accorded the arrears of pension provided by law when the application was made prior to July 1, 1880?"

The proviso to which you refer (20 Stat., 470) is: "*Provided*, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to the first day of July, eighteen hundred and eighty, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years of age."

An application is the first regular substantial step taken by a claimant to obtain a pension. In the administration of the pension laws literal adherence to form or the strict pleading of the courts of law is not required. If the claimant is identified, the time and place of his service and the injury or disease which constitute the ground of his claim are substantially set forth, the form is immaterial. Substance and merit in the application are controlling. The original application may be only sufficient to identify the claim and claimant, and will yet be a valid application, for it is subject to amendment for defective statements. Section 4718, Revised Statutes, which is a re-enactment of the twenty-second section of the act of the 3d of March, 1873, clearly contemplates the prosecution of claims by the claimants themselves, without the intervention of attorneys or agents. That section expressly refers to "applications being made by letter." The proviso to the act of 1879 doubtless had in view such applications as well as the more formal ones. The same section of the Revised Statutes contemplates that after the applications are made the necessary forms and instructions as to proof of the claims shall be furnished to the claimants by the Commissioner of Pensions. It makes the distinction between the applications and the necessary evidence or proof to establish and obtain the claims. If, then, the letter or written application made personally by the claimant is sufficient to identify the claimant and the claim he makes, and was placed upon file as a part of the record in his case before the 1st day of July, 1880, and was not abandoned, or if delay in its prosecution has been satisfactorily accounted for by sickness,

Washington Aqueduct Tunnel.

as in the case you state, and the case by the subsequent proceedings was shown to be meritorious and was granted, the application by letter is sufficient to warrant the granting of arrears provided for by the second section of the act of the 3d of March, 1879.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

WASHINGTON AQUEDUCT TUNNEL.

The Secretary of War may extend the time for the completion of the work on the Washington Aqueduct tunnel, under the contract with Beckwith & Quackenbush, in case the work is not completed by the 1st of November, 1888.

The clause in the act of March 30, 1888, chapter 47, namely, "all of said work to be completed by November first, eighteen hundred and eighty-eight," is to be understood as directory merely.

DEPARTMENT OF JUSTICE,

October 25, 1888.

SIR: Your letter of the 18th instant requests my opinion upon the following question: "Whether the Secretary of War can extend the time for the completion of the work on the Washington Aqueduct tunnel, under the contract with Beckwith & Quackenbush herewith, in view of the clause in the urgent deficiency act, approved March 30, 1888, limiting the time for the completion of the work to November 1, 1888."

The clause referred to is in these words: "all of said work to be completed by November first, eighteen hundred and eighty-eight," and is contained in the following provision of said act:

"To enable the Secretary of War to complete the work of increasing the water supply of the city of Washington, under the act entitled 'An act to increase the water supply of the city of Washington, and for other purposes,' approved July fifteenth, eighteen hundred and eighty-two, namely: For completion of lining of tunnel, two hundred and ninety-seven thousand seven hundred and fifty dollars; for completing shafts, west connection, and for superintendence and engineering, thirty-seven thousand two hundred and fifty dollars;

Washington Aqueduct Tunnel.

and for general contingencies of the work, twenty thousand dollars; in all, three hundred and fifty-five thousand dollars; all of said work to be completed by November first, eighteen hundred and eighty-eight; said sum to be subject to all the provisions and restrictions of the said act of July fifteenth, eighteen hundred and eighty-two, and of the act approved July fifth, eighteen hundred and eighty-four, making appropriations for the expenses of the government of the District of Columbia, as to its apportionment and settlement between the United States and the District of Columbia, and the refunding thereof. The work above provided for to be done under the contract heretofore made, or by a reletting, as in the discretion of the Secretary of War shall be most promotive of the interest of the Government: *Provided*, That no contract shall be made at prices greater than the prices allowed under contract under which work has been heretofore done on said tunnel."

It appears that, under the act of July 15, 1882, mentioned in the above provision, a contract for the construction of the said tunnel was entered into with Messrs. Beckwith & Quackenbush on the 29th of October, 1883, to which supplementary articles were afterwards made by agreement on the 18th of October, 1886, the 5th of December, 1887, and the 8th of May, 1888, those of the latter date being made under the provision aforesaid, which authorizes the work provided for therein to be done under the said contract, or by a reletting, as in the discretion of the Secretary of War shall be most promotive of the interest of the Government.

Upon consideration, I am of the opinion that the clause in question was not intended to be a limitation upon the authority of the Secretary of War to contract for the completion the work, or a requirement with which strict compliance is mandatory and indispensable in the prosecution of the work provided for, but is rather to be considered as merely directory to him—"as giving directions which ought to be followed, but not so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them." In *French v. Edwards* (13 Wall., 506), the Supreme Court remarks: "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power,

TIMBER ON INDIAN RESERVATIONS.

or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated."

In the absence of any negative words in the provision above quoted, restraining the Secretary of War from going on with the work after the 1st of November, or any expression therein indicating that it is the intention of Congress that the work shall be stopped, if not completed by that time, the clause referred to may, I think, be properly construed as directory; and viewing it in that light, and having regard to the general object intended to be secured by the act of July 15, 1882, and the statutory provisions supplementary thereto, including those of the act of March 30, 1888, it seems to me that the Secretary of War not only has power under this legislation to extend the time for the completion of the work under the contract referred to, but that it is his duty so to do, if in his judgment the public interests will thereby be promoted.

The papers which accompanied your letter are herewith returned.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

TIMBER ON INDIAN RESERVATIONS.

Indians occupying reservations, the title to which is in the United States subject to their occupancy, have no right to cut and remove the dead and fallen timber thereon for the purpose of sale alone; such timber, where not used by the Indians for fuel or for agricultural or other purposes connected with the occupation of the land, being the property of the United States.

DEPARTMENT OF JUSTICE,

November 20, 1888.

SIR: By your letter of the 27th of October, 1888, you ask—

"(1) Whether the Indians occupying reservations, the title to which is in the United States, have the right, in view

Timber on Indian Reservations.

of the opinion of the Supreme Court of the United States in the case of the *United States v. George Cook* (19 Wall., 591), to cut and sell for their use and benefit the dead and down timber which is found to a greater or less extent on many of the reservations and which will go to waste if not used?

"(2) If they have such right, whether it is a common right to common property belonging to the tribe or band as a whole occupying the respective reservations, or whether it is such a right as may be exercised by individual Indians belonging on the reservations for their individual benefit?

"(3) If they have the right, and it is a common right only, whether the cutting and sale of such dead and down timber by the Indians can be regulated by the Indian Bureau under the directions of this Department so as to secure to the proceeds arising therefrom the greatest possible benefit for improving their condition and promoting their civilization and self-support by the methods pursued in the work."

In the case of the *United States v. Cook* (19 Wall., 593), it is ruled that the right of the Indians on an Indian reservation is one of occupancy only; that that right of occupancy carries with it the right to improve the land by clearing it; that the right to clear includes the right to sell or dispose of timber on the land cleared, and to use the timber on the reservation for purposes necessary for improvement or residence; that when cut or severed for sale alone, and not as an incident to the occupancy, the right and title to the timber is absolute in the United States; that "what a tenant for life may do upon lands of a remainderman, the Indians may do upon their reservations, but no more." Dead and wind-fallen timber, as a part of the realty, belongs to the remainderman, and not to the tenant for life to the same extent as growing timber does.

In the case of *Bewick v. Whitfield* (3 P. Williams' Chancery Rep., 268), in discussing this question it is ruled, first, that "the timber while standing is part of the inheritance; but whenever it is severed, either by the act of God, as by a tempest, or by a trespasser, and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it, and this was so decreed upon occasion of the great wind fall of timber on the Cavendish

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estate." Secondly, "As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber."

The principle thus announced is recognized in *Lewis Bowles's Case* (11 Coke, 81), and in the case of *Shult v. Barker* (12 Sergeant & Rawle, 272).

Therefore, the dead and fallen timber that is not needed or used for improvements, agricultural purposes, or fuel by the Indians is the property of the United States. It is to be preserved and protected as such, and disposed of only as Congress by law may provide. This rule will doubtless best preserve the timber on Indian reservations and avoid much destruction by fires, which would occur as the timber became scarce and valuable, whenever its dearth might become a source of gain. Your first question is, therefore, answered in the negative, which renders a reply to the remaining inquiries unnecessary.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

OFFICIAL CONSULAR SERVICES.

Under the laws and usages governing the American consular service, the authentication, noting, etc., of marine protests are to be regarded as official consular services.

DEPARTMENT OF JUSTICE,

November 22, 1888.

SIR: By your letter of the 25th of October, 1888, you inquire, as I understand your communication, whether "the natural and essential character of the consular services of authenticating, noting, etc., marine protests, apart from the factitious status given them by inclusion in the tariff of official fees," are or are not official consular services?

The office of consul is of very ancient origin. In its early history its incumbent was a municipal officer, intrusted with the power and charged with the general duty of the enforcement of the laws of the sovereignty which he represented over its citizens resident in a special locality or municipality, out-

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side of the general territorial jurisdiction of the sovereign. Within the governments of Christendom, the extritorial jurisdiction of a foreign sovereignty over its citizens has generally ceased to exist, and the local law governs the residents as well as the citizens of a nation. But outside of the pale of Christendom, in some instances the extritorial jurisdiction of the sovereignty still exists, and the corresponding powers and duties of the consul still survive. Under international law there have been and are, therefore, different official duties incident to the office of consul, varying with time, place, and circumstances. No invariable test can be derived from international law, or from the general character of the consular office, by which to determine what services performed by the consul are official consular services, and what are not. The American consul has no authority except what may be expressly granted by a law of Congress, and acknowledged by the government in whose jurisdiction he resides. His duties are described in different acts of Congress, and in the consular instructions of the Department of State. (Warden's Consular Establishment, page 140.)

"In process of time, by traditional usage, by positive provisions of local law, and by treaty stipulations, the existing legal character with its limited rights was fixed on the foreign consuls mutually accredited in the countries of Christian Europe and America." (7 Opin., 348.)

Whether the taking of marine protests is an official consular service, or a non-consular service, must be determined by tradition, usage, treaties, and laws. The second section of the act of the 14th of April, 1792 (1 Stat., 255), provides:

"And for the direction of the consuls and vice-consuls of the United States in certain cases.

"SEC. 2. *Be it enacted by the authority aforesaid*, That they shall have the right, in the ports or places to which they are or may be severally appointed, of receiving the *protests or declarations* which such captains, masters, crews, passengers, and merchants, as are citizens of the United States, may respectively choose to make there."

By the twenty-second section of the act of the 1st of March, 1855 (10 Stat., 626), it is provided:

"That the following record books shall be provided for and

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kept in each consulate and commercial agency, * * * a book for the entry of *protests*, and in which all *other* official consular acts likewise shall be recorded."

In an opinion rendered on the 2d of June, 1855 (7 Opin., 259), Attorney-General Cushing, in classifying and distinguishing between consular and non-consular services, applying the act last referred to, concludes :

"(4) Drawing out a power of attorney, bottomry bond, will, or any such similar service, is a notarial, not a consular act; and therefore only the certificate upon it would go to account of the Government.

"(5) I should have said the same of extending a protest, but for the phrase in another part of the act, 'a book for the entry of protests, and in which all other official consular acts likewise shall be recorded,' which seems to cover the fact of extending a protest, and so to give the fee to the Government."

In determining what are the usage and law on this subject section 1745 of the Revised Statutes can not well be omitted. It provides: "The President is authorized to prescribe from time to time the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services besides such as are expressly declared by law in the business of the several legations, consulates, and commercial agencies."

This section authorizes the President to prescribe a tariff of fees for official services only, and does not authorize him to fix the rate for non-official. It also empowers him to designate or name what shall be regarded as official services beside such as are expressly declared by law. When thus empowered, if he shall name or designate in the tariff of fees as official that which before had not been so regarded, from the time of such naming or designation the services thus designated should be regarded as official. Your communication shows that the President has prescribed a rate of fees under the section, and that he has therein named such marine protests as are referred to in yours. I therefore conclude from the usage, as shown from the laws of the past (some of which have been repealed) and those of the present,

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that the "authenticating, noting," etc., of "marine protests," concerning which you inquire, are official consular services.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

WASHINGTON AND IDAHO RAILROAD COMPANY.

Under the act of May 30, 1888, chapter 336, granting to the Washington and Idaho Railroad Company a right of way through the Cœur d'Alene Indian Reservation, the Secretary of the Interior has no authority to permit the construction of a railroad across the reservation prior to the ascertainment, fixing, and payment of the compensation as provided for in section 3 of that act.

By that section three conditions precedent are annexed to the grant, namely: (1) The plats made upon actual survey for the definite location of the road must be filed; (2) those plats must be approved in writing by the Secretary of the Interior; (3) the compensation must be fixed and paid. Until all of these conditions are performed no right of any kind respecting the right of way becomes vested in the company.

DEPARTMENT OF JUSTICE,

December 3, 1888.

SIR: By your letter of the 1st of December, 1888, you ask: "First. Whether since the passage of the act entitled 'An act granting to the Washington and Idaho Railroad Company the right of way through the Cœur d'Alene Indian Reservation,' passed May 30, 1888, chapter 336, the Secretary of the Interior possesses any authority rightfully to permit the construction of a railroad across the reservation in advance of the ascertainment, fixing, and payment of the compensation provided to be ascertained by him in section 3 of the act, and therein required to be fixed and paid before a right of any kind shall vest in the company 'in or to any part of the right of way.' In other words, whether the Secretary of the Interior has any rightful authority to permit a railroad to be constructed across an Indian reservation until a right to construct it has vested by virtue of an act of Congress?"

"Second. If you should be of the opinion that there is authority and power in the Secretary of the Interior to permit by rightful administration the construction of this railroad across this reservation before the compensation is fixed and

Washington and Idaho Railroad Company.

paid, whether he has then any lawful power to make any agreement with the parties by which a deposit of money can be required by him to be made in the United States Treasury, or elsewhere, as security for the payment of the compensation, when ultimately fixed, so that he could retain and control the expenditure of the money in liquidating the compensation which he should subsequently fix under the third section.

"Third. Whether it be legally possible for him to require and accept a bond, with sufficient sureties, which should be safely obligatory to provide for the benefit of individual Indians and of the tribe the payment of compensation and damages? And if so, what the terms and conditions of such a bond should be?"

The taking of property without compensation is a violation of an absolute property right. When taken with compensation, by authority of law, the law must be strictly construed in favor of the property-owner and against the grantee. The property over which the right of way is granted by the act under consideration is subject, in whole or in part, to three different rights which were to be provided for. The fee, subject to the rights of the Indians, is vested in the United States. The Indians as a tribe have or had a right of indefinite occupancy in common over all the land. As to certain portions of it, the act contemplates that individual Indians have or may have a special right of occupancy of a part in severalty. With reference to the rights of the Indians as a tribe and as individuals, the Government holds and exercises a power closely analogous to that of a guardian over the property of his ward. That this power may not be abused, nor the rights of the Indians be lost or jeopardized, is clearly intended to be carefully guarded by the granting act. Its first section provides "that the right of way is hereby granted as *hereinafter set forth*." This is not an absolute grant, to take effect at the date of acceptance by the corporation, but is subject to the conditions imposed by the later provisions of the law." The third section of the act, among other things, provides:

"No right of any kind shall vest in said railway company in or to any part of the right of way herein provided for

Washington and Idaho Railroad Company.

until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station buildings, depots, machine-shops, side-tracks, turn-outs, and water-stations, shall be filed with and approved by the Secretary of the Interior, which approval shall be made in writing, and be open for the inspection of any party interested therein and until the compensation aforesaid has been fixed and paid."

By this, three different conditions precedent are annexed to the grant:

- (1) The plats made upon actual survey for the definite location must be filed.
- (2) Those plats must be approved in writing by the Secretary of the Interior; and
- (3) The compensation must be fixed and *paid*.

Until all three of these conditions shall have been performed the act declares "No right of any kind shall vest in said railway company as to any part of the right of way." "When compensation is to be a condition to or simultaneous with the taking, equity will enjoin the use of the land until the compensation be made (*Shute v. Chicago, etc., R. R.*, 26 Ills., 426; *People v. Law*, 34 Barber, 494; *Western, etc., R. R. v. Owings*, 15 Md., 199; *Curran v. Shattuck*, 24 Cal., 427; *Pennrice v. Wallis*, 37 Miss., 172; *Johnson v. Alameda County*, 14 Cal., 106; Sedgwick on Construction of Statutory and Constitutional Law, 465, note). When the Constitution requires the compensation to be paid prior to the taking, and the statute authorizing the taking does not specify whether the compensation is to be made before or after the property is taken, it will be construed to intend the former (*Sharpless v. West Chester*, 1 Grant's Cases, 257)." If the railroad company, for the purposes of construction, before the compensation has been paid, shall enter upon the reservation and eject the Indians as a tribe from their common right of occupancy and the individual Indians from such several rights of occupancy as each may possess on the line of the right of way, such ouster must either be wrong or be done under a right granted by the act. It can not be done under a right granted by the act, for the language, "no right of any kind shall vest," is broad enough to cover the right of possession

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and occupancy which might be taken for construction. So far as the Indians are concerned such taking would embrace their whole estate, for, as is before stated, their whole rights are those of occupancy. These rights are the very kind of rights that were intended to be protected. The entry, therefore, for construction before the payment of the compensation would be wrongful, and it is not within your power to grant it nor within your discretion to permit it. The provisions of the same section, empowering you to fix the compensation to be paid and the time and manner of payment, impose upon you the duty to fix the compensation and time and manner of payment within such time as will leave enough of the period limited in the act before the expiration of the grant to allow the construction to be accomplished within two years from the passage of the act. If the limitation of time in the first instance was insufficient to allow the conditions precedent to be performed and the road to be constructed before its expiration, the company could have declined to accept under the terms of the act, and all embarrassment would have been avoided. The first inquiry is therefore answered in the negative, which renders the second and third immaterial.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

RETIRED LIST OF THE ARMY.

L., a major in the Seventh Infantry, was, by direction of the President, dropped from the rolls of the Army November 25, 1861, and W., a captain in the Fourth Infantry, was with the advice and consent of the Senate appointed major in the Seventh Infantry, vice L., dropped. Afterwards, on November 27, 1866, the President revoked the order dropping L., and directed that he be restored to his former commission to fill a vacancy of major in the Eighteenth Infantry, to date from July 28, 1866, and at the same time, by direction of the President, L. was placed on the retired list as major: *Advised* that the action of the President on the 27th of November, 1866, was ineffectual to restore L. to the Army and place him on the retired list, and that he is not entitled to be borne thereon.

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S., a captain in the Seventh Infantry, was summarily dismissed the service by direction of the President July 15, 1863, and notified thereof. Afterwards, on August 11, 1863, the order of dismissal was revoked; whereupon S. (the vacancy not having been filled in the mean time) returned to the position from which he was dismissed and continued to serve therein until December 30, 1864, when, upon the finding of a retiring board, he was retired under the provisions of the act of August 3, 1861: *Advised* that the dismissal of July 15, 1863, created a vacancy which could not otherwise be filled than by an appointment with the advice and consent of the Senate; that the subsequent revocation of that order on the 11th of August, 1863, was ineffectual to restore S. to his former position in the Army; that when, afterwards, he was put on the retired list he was not a commissioned officer of the Army, and therefore ineligible to a place thereon; and that, accordingly, he is not entitled to be borne on such list.

L., a first lieutenant in the Seventh Infantry, having been found by a retiring board "incapacitated for active service from insanity, which insanity is not incident to the service," was, by direction of the President, retired July 31, 1863, on pay proper alone under the act of August 3, 1861. At L.'s request the order of retirement was, by direction of the President, on June 23, 1869, so amended as to wholly retire him from service with one year's pay and allowances. On April 2, 1878, by direction of the President, the order of June 23, 1869, was declared void, on the ground that L. was insane when he requested it; and he was restored to the retired list in accordance with the original order: *Advised* that after the President had once acted upon the finding of the retiring board, by placing L. on the retired list with pay proper alone, his power over the case was exhausted, and the subsequent order wholly retiring L. was void for want of authority thus to retire him; and that therefore L. is entitled to be borne on the retired list conformably to the order retiring him on pay proper alone.

DEPARTMENT OF JUSTICE,
December 3, 1888.

SIR: In response to your request, made some time ago, for an opinion as to the right of certain persons to be borne on the retired list of the Army—namely, Daniel E. Sickles, as major-general, retired; Adam Badeau, as captain, retired; Isaac Lynde, as major, retired; Charles B. Stivers, as captain, retired; and James T. Leavy, as first lieutenant, retired—I now have the honor to submit the following:

The cases of General Sickles and Captain Badeau are alike in all material respects. It appears that each of these officers, after being placed on the retired list, accepted in 1869 an appointment in the diplomatic service. General Sickles

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remained in that service until April, 1874. Captain Badeau remained therein only a few months, but subsequently, in 1870, entered the consular service, wherein he held an appointment for several years. In the mean time they were each actually borne on the retired list and have since been continued thereon.

By section 2 of the act of March 30, 1868 (the provisions of which section are embodied in sections 1223 and 1440, Revised Statutes), officers of the Army or Navy accepting or holding any appointment in the diplomatic or consular service are to be considered as having resigned, and their places in the military or naval service are to be deemed vacant, etc. The act of March 3, 1875, chapter 178, however, contains a clause providing that a certain class of retired officers who are "now (*i. e.*, at the date of the act) borne on the retired list shall be continued thereon notwithstanding the provisions" of section 2 of said act of 1868.

Both General Sickles and Captain Badeau are within the class of retired officers described in the clause of the act of 1875 above referred to, and they were each actually borne on the retired list when that act was passed. Their right now to be borne thereon depends upon the operation and effect of the provisions of the said acts of 1868 and 1875 upon their respective cases, and necessarily involves a construction of those provisions.

There is a suit pending in the Supreme Court (*Badeau v. The United States*) which presents the same question precisely that arises in those cases, involves a construction of the same statutory provisions, and which will doubtless be determined during the present term of that court. In view of this, I think it unadvisable to express any opinion upon the two cases just referred to, and suggest that it would be proper to await the decision of the court in that suit, which will finally settle the question arising in them.

The case of Maj. Isaac Lynde is this: By direction of the President, announced in paragraph 1 of General Orders, No. 102, dated Washington, November 25, 1861, Major Lynde, Seventh Infantry, was from that date dropped from the rolls of the Army. Capt. Henry D. Wallen, Fourth Infantry, was subsequently promoted and appointed by the President, by

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and with the advice and consent of the Senate, to be major of the Seventh Infantry, November 25, 1861, *vice* Lynde dropped (see General Orders, No. 63, dated Washington, June 10, 1862), which appointment was accepted by Wallen, and he was commissioned accordingly. Afterwards, by General Orders, No. 94, dated Washington, November 27, 1866, the President directed that paragraph of General Orders, No. 102, of November 25, 1861, be revoked, and that Major Lynde be restored to his commission to fill a vacancy of major in the Eighteenth Infantry, to date July 28, 1866; and, at the same time, by direction of the President, Major Lynde, Eighteenth Infantry, was placed on the retired list to date from July 28, 1866 (see paragraph 2 of General Orders, No. 94, aforesaid).

In this case, irrespective of the effect of the order of November 25, 1861, dropping Major Lynde from the rolls of the Army, the fact that Wallen was appointed by the President, by and with the advice and consent of the Senate, to be major of the Seventh Infantry, in the place of Lynde, and was commissioned as such, operated to supersede the latter, and to completely sever his relations with the Army, if they were not already severed by the effect of said order (see *Blake v. United States*, 103 U. S. R., 227; *Keyes v. United States*, 109 U. S. R., 336). Having thus ceased to be an officer in the Army, he could not again become one otherwise than by a new appointment, made in conformity to the law of the military service, and to which the advice and consent of the Senate were necessary (97 U. S. R., 426). The order of the President of November 27, 1866, revoking the previous order by which Major Lynde was dropped, and restoring him to his commission, was ineffectual to place the latter in the active list of officers of the Army; and it follows that the order of the President of the same date, putting him on the retired list of the Army, was inefficient for this purpose—none but commissioned officers in active service being then eligible thereto.

I am therefore of the opinion, upon the facts above stated, that Major Lynde is not entitled to be borne on the retired list of the Army.

The case of Capt. Charles B. Stivers is as follows: While holding a commission as captain in the Seventh Infantry he

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was summarily dismissed the service by direction of the President, to date July 14, 1863, per Special Orders, No. 313, issued from the War Department, dated Washington, July 15, 1863. Of this order he was notified, as appears by a letter from him to the Adjutant-General, dated at Rouse's Point, N. Y., July 28, 1863, wherein he writes: "I have been dismissed the service for not joining my regiment. My health has been so feeble that I could not do so. I respectfully ask that my case may be reconsidered, and that, if consistent with the interests of the service, I may be reinstated to my former rank." Afterwards, on reconsideration of his case, the order of dismissal was revoked by Special Orders, No. 356, issued from the War Department, dated Washington, August 11, 1863. Thereupon Captain Stivers returned to the position from which he was dismissed (the vacancy not having been filled in the mean time), and continued to serve in that position until December 30, 1864, when, upon the finding of a retiring board, he was retired from active service under the provisions of the act of August 3, 1861.

At the time of the dismissal of Captain Stivers, as above, the President was invested with power to summarily dismiss from service a commissioned officer of the Army. This power (if not already possessed by him) was given by section 17 of the act of July 17, 1862, chapter 200.

In the case of the *The United States v. Corson* (114 U. S. R., 619) the effect of an order of dismissal by the President, issued while clothed with that power, and also the effect of its subsequent revocation by him, were considered by the Supreme Court.

There an officer holding a commission as captain and assistant quartermaster of volunteers was, by order of the President, dated March 27, 1865, summarily dismissed the service. On June 9, 1865, an order was issued by the President revoking the order of dismissal and restoring him to his former position in the service. Between the date of dismissal, March 27, 1865, and the date of revocation, June 9, 1865, it does not appear that the vacancy was filled by another appointment. By an order issued from the War Department, under date of June 19, 1865, he was assigned to duty as division quartermaster of the First Division, First Army Corps, with the

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temporary rank of major in the Quartermaster's Department, under the act of July 4, 1864, and served in that position until October 7, 1865, when he was honorably mustered out of the service of the United States.

The court held that the effect of the order of March 27, 1865, dismissing the officer from the service was to sever his relations with the Army; that thenceforward and until in some lawful way again appointed he was disconnected from that branch of the public service as completely as if he had never been an officer of the Army; and that he could not regain his position and become entitled to its emoluments by means of a subsequent order revoking the order of dismissal and restoring him to the position.

This decision of the Supreme Court is clearly applicable to the case of Captain Stivers, and must be regarded as conclusive of it. According to the doctrine there laid down, the order of July 15, 1863, dismissing that officer from service created a vacancy, which could not otherwise be filled than by an appointment with the advice and consent of the Senate (97 U. S. R., *supra*); and consequently the subsequent order of August 11, 1863, revoking that order, was ineffectual to restore him to his former position in the Army, although it had in the mean time remained vacant.

It follows that when, afterwards, Captain Stivers was put on the retired-list he was not a commissioned officer of the Army, and for that reason was not eligible to a place on that list. The finding of the retiring board (upon which he was placed there) that he was incapacitated for active service was not conclusive of the question of his eligibility, the jurisdiction of the board being limited to the determination of "the facts as to the nature and occasion of the disability" of the officer, and not including within its scope the validity or invalidity of his commission.

I am therefore of the opinion that Captain Stivers is not entitled to be borne on the retired list of the Army.

The remaining case is that of First Lieut. James T. Leavy, formerly of the Seventh Infantry. It appears that this officer, having been found by a retiring board "incapacitated for active service from insanity, which insanity is not incident to the service," was, by direction of the President, retired

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from active service "on pay proper alone," July 31, 1868, under section 17 of the act of August 3, 1861 (see Special Orders, No. 182, dated Washington, July 31, 1868.) On June 23, 1859, by direction of the President, the order retiring him from active service as above was so amended as to *wholly* retire him from the service with one year's pay and allowances, to date from July 1, 1869, and his name was directed to be thenceforward omitted from the Army Register (see Special Orders, No. 151, dated Washington, June 23, 1869). This amendment, it is stated, was made at Lieutenant Leavy's request. On April 2, 1878, by direction of the President, the order of June 23, 1869, wholly retiring that officer, was declared void, on the ground that he was insane when he made such request, and he was restored to the retired list in accordance with the original order (see Special Orders, No. 69, dated Washington, April 2, 1878). And by a joint resolution passed by Congress June 18, 1878, the Paymaster-General was "authorized and directed to adjust the pay accounts of the said Leavy, and pay out of any moneys appropriated for the pay of the Army the balance, if any, found to be due him on account of salary during the time his name was omitted from the Army Register on account of his request to be wholly retired, which request was made by him while insane." (20 Stat., 588).

Section 17 of the act of August 3, 1861, under which Lieutenant Leavy was retired from active service, provided for the assembling of a board of Army officers "to determine the facts as to the nature and occasion of the disability of such officers as appear disabled to perform military service," and invested such board with the power of a court of inquiry and court-martial, their decision to be subject to like revision as that of such courts by the President of the United States. It further provided that whenever the board finds an officer incapacitated for active service it should report whether, in its judgment, the incapacity resulted from long and faithful service, from wounds or injury received in the line of duty, etc., or from any other incident of service, adding, "If so, and the President approve such judgment, the disabled officer shall thereupon be placed upon the list of retired officers according to the provisions of this act. If otherwise,

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and if the President concur in opinion with the board, the officer shall be retired as above, either with his pay proper alone or with his service rations alone, at the discretion of the President, or he shall be wholly retired from the service with one year's pay and allowances; and in this last case his name shall be thenceforward omitted from the Army Register."

In the case under consideration the board found that the incapacity of the officer for active service resulted from a cause not incident to the service. Upon this finding, if the President concurred in opinion with the board, he had power (1) to place the officer on the retired list either with his pay proper alone or with his service rations alone, or (2) to wholly retire him from the service with one year's pay and allowances. And having once acted under that power upon the report of the board, by retiring the officer on his pay proper alone, the inquiry arises, whether such power as to this particular case was not thereby exhausted. I am inclined to think that this inquiry should be answered in the affirmative. In general, where power is given by statute to enable an officer to do a particular act which would otherwise be beyond the scope of his authority, after such power has been once exercised it is deemed exhausted and can not be exercised again.

The Court of Claims, in the case of *McBlair v. United States* (19 C. Cls. R., 528), referring to the power of the President above adverted to, remarks: "He had a power to exercise in the disposition of the report (*i. e.*, of the retiring board in that case), and his action thereon made, in law, the complete exercise of the full measure of authority provided by the statute. It is not a *continuing* power, but is performed to the extent of its existence by the *one* act of the President." In this connection the court cites *People v. Waynesville* (88 Ill., 470-475), where it is observed: "As a general rule, where the General Assembly confers a power, and the persons upon whom it is conferred act under it, the power is exhausted, unless power is given to act again under the same authority;" and also *Ex parte Randolph* (2 Brock., 473, 474), where the court say: "I take it to be a sound principle, that when a special tribunal is created, with limited power

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and a particular jurisdiction, whenever the power is once executed the jurisdiction is exhausted and at an end—that the person thus invested with power is, in the language of the law, *functus officio.*"

Regarding the power of the President from this point of view, the order of June 23, 1869, wholly retiring Lieutenant Leavy from service, was void for want of authority in the former thus to retire him. The circumstance that such order was issued in compliance with a request made by Lieutenant Leavy when he was insane may afford additional ground for holding it void, as it was subsequently declared to be by the order of April 2, 1878, by which he was reinstated on the retired list. Moreover, the last-mentioned order is impliedly sanctioned by Congress, and his right to have been borne on that list during the time his name was dropped therefrom is clearly recognized by that body in the enactment of the joint resolution of June 18, 1878, providing for the payment of any balance due him "on account of salary during the time his name was omitted from the Army Register," etc.

In my opinion Lieutenant Leavy is legally entitled to be borne on the retired list of the Army conformably to the order of July 31, 1868, retiring him on pay proper alone.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

COMMISSIONER OF PENSIONS.

Duty of the Commissioner of Pensions considered in connection with a statement of facts submitted by him, relating to the recovery of money paid on a pension certificate alleged to have been fraudulently obtained.

DEPARTMENT OF JUSTICE,

December 10, 1888.

SIR: By your indorsement of the 30th of November last on the letter of the Commissioner of Pensions of the 27th of the same month, you request my views as to the rights and duties of the Commissioner of Pensions on the statement of facts and inquiries submitted in his communication.

It appears from the statement of facts contained in his

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letter, that in 1887 a pension certificate was granted and issued to Francis Patterson ;

That he received the first *payment* after the granting of the certificate by the proper pension agent, which, with the arrears, amounted to \$13,312 ;

That after the first payment had been made a special examination of the claim, as adjudicated, was had, in accordance with the provisions of section 4744 Revised Statutes, as amended by the act of 25th of July, 1882 (Digest of Pension Laws, p. 591) ;

That on such examination, proof, which was satisfactory to the Secretary of the Interior, was taken, which established that the name of the pensioner was put on the rolls by or through false and fraudulent representations, whereupon the Secretary of the Interior caused the name of Francis Patterson, the pensioner, to be stricken from the rolls ;

That the War Department also restored to its record, on evidence which was sufficiently satisfactory, the charge of desertion against the pensioner, which had been removed ;

That the pensioner, with certain alleged accomplices, was prosecuted in the proper United States court for perjury, for the making of false affidavits to obtain the pension, and the defendants were acquitted ;

That recapture of the money which was paid in pursuance of the certificate, so far as it could be traced and identified, was made by officers of the United States. Of the money recaptured, \$4,725 was taken from Mrs. Dr. Mills, the wife of one of the alleged accomplices of Patterson, and \$62.53 from the wife of Patterson.

It also appears that proof in the possession of the Commissioner of Pensions established that a certificate of deposit of the Lock Haven Bank, of Pennsylvania, is now in the possession of the Second National Bank, of Elmira, N. Y., for a part of the funds alleged to have been fraudulently received by Patterson ; also that a bond and mortgage of John B. Fishler and wife for \$3,000 was purchased for the use of Patterson with a part of the same money.

It also appears that suits have been brought in the circuit court of the United States for the western district of Virginia by direction of the Solicitor of the Treasury, to recover

Commissioner of Pensions.

certain other moneys and property which are claimed to have been traced into the hands of Mills and others.

It is to be inferred from the tenor of the whole transaction that Patterson is insolvent.

The inquiry is, What are the "rights and duties" of the Commissioner of Pensions in the premises?

The Commissioner of Pensions is generally charged with the administration of the pension laws, subject to the supervision of the Secretary of the Interior. By section 4744 of the Revised Statutes, as amended, he is specifically charged with the duty of making special examinations into the merits of pension claims, whether pending or adjudicated, and to aid in the prosecution of any parties who may appear on such examination to be guilty of fraud in the prosecution or procuring of such claims. The duty of examining the fraud alleged to have been perpetrated in this case has already been performed by the Commissioner of Pensions. That examination resulted in the obtaining of evidence which is claimed to show that money has been wrongfully obtained by Patterson from the United States Treasury. In aid of the prosecution of legal actions in court to recover this money wrongfully obtained back, it is the duty of the Commissioner of Pensions to furnish the several officers charged with the conduct of such actions with all material facts and evidence at his command, or which he can obtain, to sustain the claim of the Government. With reference to the suits that have been already brought, by direction of the Solicitor of the Treasury, in the western district of Virginia, he appears to have already done so. He should further report to the Solicitor of the Treasury all the facts and evidence with reference to the certificate of deposit of the Lock Haven Bank, and also with reference to the bond and mortgage of Fishler; and if, on examination, the Solicitor of the Treasury shall determine the evidence is sufficient to warrant legal action for their recovery, it will be his duty to furnish all aid in his power for the successful prosecution of such suits as may be brought. The money that is in the hands of Chief Clerk Brock, from the statement of facts submitted, seems to have come into his hands by the common-law remedy of recaption. A "party may peaceably retake his goods wherever he

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happens to find them, unless a new property be fairly acquired therein." (3 Blackstone's Commentaries, 5; 4 *id.*, 363.)

The United States has the same remedies for the protection and recovery of its property that an individual under like circumstances has. Doubtless, at the time of the recaption of the money by the examiner who obtained it from Mrs. Mills and Mrs. Patterson, he had reason to think there was no doubt that the money belonged to the United States; but in the exercise of the remedy of recaption on the part of the Government the officer acts at his peril. This remedy by the act of the party should not be resorted to in doubtful cases. In cases where there is a substantial dispute as to the facts, the regular orderly proceedings of the courts of law should be resorted to, and the *prima facie* presumption of right of property arising from possession should be respected until overthrown by a judicial determination. No provision of law exists by which the Government can give bond of indemnity to the officer in case he should be found, on a judicial trial, to have made a wrongful recaption. In this case none of the money was found in the possession of Patterson. The greater part of it was found with Mrs. Mills; the balance with Mrs. Patterson. Their possession is *prima facie* evidence of ownership. The pension certificate under which it was claimed to have been recovered for the Government would be *prima facie* evidence of the right of property. That *prima facie* right of property would have to be overthrown by evidence of fraud in the obtaining of the certificate. That fraud is not to be presumed, but must be clearly proven to sustain a retention of the money. The dropping of the name of the alleged pensioner from the rolls by the Secretary of the Interior, while conclusive as to future payments on the certificate, would have no retrospective effect in a judicial trial as to the right of the alleged pensioner to such money as had been paid before his name was dropped. The verdict of acquittal in the prosecution of the alleged pensioner for perjury does not establish the right of the pensioner to the money, nor could the proceedings in that case be legally received in evidence in a civil suit. (1 Greenleaf on Evidence, sec. 537). Yet the perjury with which the

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defendant was charged in the prosecution was the chief element of fraud relied on to show the right to the money in the United States. The verdict in that case establishes that twelve men, legally qualified to try that issue, believed there was no reasonable doubt as to whether or not the perjury had been committed. As the recaption of the money was at the officer's peril, its retention by the present or any future officer continues subject to the same condition. Future officers may decline to receive the money and assume the peril, and even if they did accept it, such acceptance would not effect a legal release of responsibility of prior officers who made the recaption. The case is therefore such a one that the officer would be justified in returning the money to the persons from whom it was obtained. If this course be adopted, the duty would devolve upon the Commissioner of Pensions to report all the facts, with the evidence, immediately to the Solicitor of the Treasury, so that he might bring suit to recover the money, if the evidence, in his judgment, should warrant such action. But if, to avoid suit by the Government to recover the money, the persons from whom it was obtained, and those having claim to it, will execute a release to the United States of all right or rights, it should then be returned to the Treasury in due course of law.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

DOUBLE PENSIONS.

A person to whom a pension certificate was granted as the widow of a soldier in the war of the rebellion was also granted a pension certificate as the widow of a soldier in the war of 1812, and drew pensions upon both certificates from March 9, 1878, to December 3, 1883. The Commissioner of Pensions, on discovering this, required her to make an election, and she having elected to hold the first-mentioned certificate, he ordered the amount which had been paid to her upon the other certificate to be withheld in installments of \$6 per month from payments thereafter, and issued an order to the pension agent accordingly: *Advised that the order made in this case, being within the general jurisdiction of the Commissioner, is obligatory on the pension agent, and that the accounting officers of the Treasury have no power to disallow payments made by the agent pursuant thereto.*

Double Pensions.

It is not within the province of the accounting officers of the Treasury, upon learning of any order made by the Commissioner of Pensions to a pension agent for the payment of pensions, to notify such agent of what their decision will be upon his account when rendered.

In the case stated, the whole of the monthly pension under the certificate which the pensioner elected to hold should be withheld until the amounts so withheld shall equal the sum paid the pensioner under the other certificate.

DEPARTMENT OF JUSTICE,

December 12, 1888.

SIR: By your letter of the 7th instant you request my opinion upon the following questions:

"(1) Is the order of the Commissioner of Pensions to a pension agent obligatory upon him; and, if so, have the accounting officers of the Treasury any jurisdiction to disallow the payments made in pursuance of such order?

"(2) Is it within the jurisdiction or province of the accounting officers of the Treasury, upon learning of any order made to a pension agent for the payment of pensions, to issue any notice of what their decision will be upon his account when rendered, without request therefor?

"(3) Ought the whole amount of the monthly pension under the existing certificate to be withheld until the sum of the pension shall equal the amount paid the pensioner under the certificate of the war of 1812?"

The facts on which the questions arise, as stated by you, are: "Sarah Ranier is a pensioner as the widow of a soldier during the war of the rebellion. She was also granted a certificate as the widow of a soldier of the war of 1812, and drew pension from March 9, 1878, to December 3, 1883, inclusive, under both certificates. On discovery of the fact, the Commissioner of Pensions required her election, and she having determined to hold the certificate under the later pension laws, the Commissioner ordered the amount which she had been paid under the other certificate, being \$550.67, to be withheld from payments made upon the later certificate in installments of \$6 per month, and directed the pension agent at Indianapolis to pay all that was due under such certificate, less said monthly deduction. The accounting officers give notice to the pension agent that they will disallow his account for any such payment, holding that there

Double Pensions.

should be no payment made until, by lapse of time, the pension would discharge the indebtedness. The action of the Commissioner of Pensions has not yet been reviewed by the Department."

The pension agent is a disbursing officer, and is the subordinate of the Commissioner of Pensions. The Commissioner is an officer of the Department of the Interior, and subject to the direction of the Secretary of the Interior. The accounting officers of the Treasury are officers of the Treasury Department, and subject to the direction of the Secretary of the Treasury. To avoid conflict of jurisdiction and maintain the autonomy of the departmental distribution of duties and labors established by law, the subordinates of a Department, upon matters within their cognizance, should communicate to their own superior officer any alleged error in the administration of any other Department, by whom it should be communicated to the head of the Department in which the alleged error occurred, who, if he regards the charge of error as substantial, will rectify it, and through the proper channels of his own Department communicate the result to his subordinate. In the case submitted, the communication of the Third Auditor, which was sent directly to the pension agent, should have gone in the regular course through the Secretary of the Treasury to the Secretary of the Interior, who had the power, if the action of the pension agent was erroneous, to make the necessary order to correct it. The pension agent can not obey the order of the Commissioner of Pensions and at the same time conform to the notice of the Third Auditor, for the order and notice are inconsistent. The general duty of the administration of the pension laws is committed to the Commissioner of Pensions, subject to the direction of the Secretary of the Interior.

Section 4715, Revised Statutes, under which the accounting officers of the Treasury assume to disallow in the accounts of the pension agents credits for money paid by them in pursuance of the orders of the Commissioner of Pensions, is a part of the system of pension laws, the administration of which comes within the duties of the Commissioner of Pensions. That section provides :

"Nothing in this title shall be so construed as to allow

Double Pensions.

more than one pension at the same time to the same person, or to persons entitled jointly ; but any pensioner who shall so elect may surrender his certificate, and receive, in lieu thereof, a certificate for any other pension to which he would have been entitled had not the surrendered certificate been issued. But all payments previously made for any period covered by the new certificate shall be deducted from the amount allowed by such certificate."

Every duty imposed by this section is within the administrative powers of the Commissioner. The pensioner is to make an election. This election is to be communicated to the Commissioner of Pensions. The pensioner is to receive a new certificate. This new certificate is to be issued by the Commissioner of Pensions. The payments made on the old certificate for any period covered by the new, are to be deducted from the amount allowed by the new certificate. This deduction is to be made by the Commissioner of Pensions. The whole section is a rule to guide the Commissioner when he, by the certificate, sets forth the amount to be paid by the pension agent to the pensioner. When the Commissioner of Pensions has transmitted to the pension agent the new certificate, showing the amount to be paid to the pensioner, such action is conclusive on the agent. He has no power to review the action of his superior officer, and to say : "This certificate is issued for too much, or too little, and will pay more or less, as seems to me to be lawful." The pension agent has no discretion in the matter, but must pay in accordance with the certificate. It follows that, if the law compels him to pay it, it is not within the power of the accounting officers of the Treasury to disallow a credit for that which he shall have paid according to law. In this case an order of the Commissioner was made and was certified to the pension agent instead of a new certificate. That order was but a modification of the certificate already in the possession of the pensioner directing the amount to be deducted. The Commissioner of Pensions has general jurisdiction of the subject-matter, as has been shown. The form he adopts in the mode of administration does not change the principle. If his certificate or order duly certified in lieu thereof was issued for an amount too great, it is only an error and does not

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render the certificate or order void. If the order issued was erroneous, the error, if brought to the attention of the Commissioner of Pensions by the accounting officers of the Treasury, or any one else, through the proper channel, would be corrected either by himself, or his superior, the Secretary of the Interior, or, in case of disagreement between the Secretary of the Interior and the Secretary of the Treasury, by the President. But until reviewed, or modified in due course, the order can not be treated as void, nor disregarded by either the pension agent or the accounting officers of the Treasury.

I therefore answer your first inquiry, that the order made in this case being within the general jurisdiction of the Commissioner of Pensions is obligatory on the pension agent, and the accounting officers of the Treasury have no power to disallow the payments made by the agent in pursuance of it.

I answer your second in the negative.

If by your third question you mean to inquire whether the whole amount ought to be withheld while the certificate and order of the Commissioner, as they now exist, stand unrevoked and unmodified, I would answer it in the negative; but if your inquiry means, should the order be modified so as to withhold the whole amount until the sum of the pension withheld shall equal the amount overpaid, it raises a different question.

The statute says: "But all payments previously made for any period covered by the new certificate shall be deducted from the amount allowed by such certificate." The payments made between 1878 and 1883, during which the pensioner drew both pensions, are covered by the new certificate. If it had been issued in 1883 instead of 1878, the whole amount overpaid would under the law have been required to be deducted from the amount allowed by him. The order of the Commissioner is but a modification of the certificate issued before, and is to be regarded as though it had been originally incorporated into the second certificate, from which, by mistake, it had been omitted. The order should therefore be modified to conform to what it should originally have been. Your third inquiry, thus interpreted, I therefore answer in the affirmative.

Salary of Minister.

The conclusions I have reached are substantially sustained by an opinion, on analogous questions, rendered by Attorney-General Brewster on the 28th day of April, 1882.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SALARY OF MINISTER.

By act of July 11, 1888, chapter 614, the office of chargé d'affaires to Paraguay and Uruguay, the salary of which was \$5,000 per annum, was abolished, and provision made for representing the United States there by a minister at \$7,500 a year. B., who at that time held the former office, was on the 11th of August, 1888, appointed minister. He received his commission at his place of duty on the 3d of October, 1888, and on the latter date took the official oath and entered upon the duties of his office as minister: *Advised* that B. is entitled to draw his salary as minister from the 3d of October, 1888, the date on which he qualified for the office and entered upon its duties, and not from the date of his appointment (Aug. 11, 1888).

DEPARTMENT OF JUSTICE,

January 12, 1889.

SIR: By your letter of the 14th of December, 1888, it appears the United States was represented at Paraguay and Uruguay by a chargé d'affaires. By the appropriation act of the 11th of July, 1888, the office of chargé d'affaires to those countries was abolished and provision made for representation by a minister. The salary of the chargé d'affaires, while the office existed, was \$5,000 a year. The salary of the minister is \$7,500 a year. John E. Bacon, who was chargé d'affaires, was appointed minister on the 11th of August, 1888. He did not return to the United States. His commission as minister was delivered to him at his place of duty on the 3d of October, 1888, and the same day he took the official oath and entered upon the duties of his office as minister. Until he assumed the office of minister he continued to discharge his duties as chargé d'affaires. On this statement of facts you inquire "Whether Mr. Bacon is entitled to draw for his salary at the rate of \$7,500 a year from (a) July 1, 1888, the beginning of the fiscal year; (b) from August 11, 1888,

Salary of Minister.

the date of his commission ; or (c) from October 3, 1888, the date of his taking the oath of office as minister resident."

The office of minister and chargé d'affaires are separate and distinct offices, of different grades in the diplomatic service. Section 1740 of the Revised Statutes provides :

"No * * * minister * * * shall be entitled to compensation for his services, except from the time when he reaches his post and *enters upon* his official duties." * * *

It also provides :

"No * * * chargé d'affaires shall be entitled to compensation for his services, except * * * to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied * * * * * in making the direct transit between the place of his residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned. And no person shall be deemed to hold any such office after his *successor* is appointed and *actually enters* upon the duties of his office at his post of duty."

These extracts from the statute establish that the minister's salary begins when he *enters upon* his official duty ; that the chargé d'affaires shall be allowed his pay while he legally performs the "official service" of his office, and that his legal discharge of those services terminated when his successor "actually enters upon the duties of his office at his post of duty." The minister in this case was the *successor* of the chargé d'affaires. The salary of the chargé d'affaires stops when the minister *enters upon* his duties. The minister's salary then begins.

Section 1756 of the Revised Statutes provides :

"Every person elected or appointed to any office of honor or profit either in the civil, military, or naval service, excepting the President and the persons embraced by the section following, shall, before *entering upon* the duties of such office, and *before being entitled to any part of the salary* or other emoluments thereof, take and subscribe to the following oath."

(After which the form of the official oath follows.)

Section 1757 provides a different form of oath in a certain

Enlisted Men of the Navy and Marine Corps.

contingency in lieu of that provided for in section 1756; but whatever form of oath is taken, the taking of the oath is a prerequisite to the entering upon the official duties or drawing salary therefor. That the minister prior to his appointment had taken the oath and entered upon the duty of a different office does not relieve him from the requirements of section 1756. By its terms that section provides that the appointee shall take the oath before he enters upon the duties of *such office* as he may be appointed to. That Mr. Bacon was his own successor does not relieve him from the provisions of the section, for it contemplates that the oath shall be taken at every new appointment before entering upon the duty.

It is therefore concluded that Mr. Bacon is entitled to draw his salary at the rate of \$7,500 annually from the 3d of October, 1888, the date at which he took his oath of office; and this is in accord with the general principle so well recognized in the matter of the payment of salaries of officials. (2 Opin., 27, 638; 3 *ib.*, 105, 124, 641; 4 *ib.*, 123, 250, 318, 348; 5 *ib.*, 132; 7 *ib.*, 304; 10 *ib.*, 250, 308.)

Very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

ENLISTED MEN OF THE NAVY AND MARINE CORPS.

The phrase, "by reason of absence from his command at the time he became entitled to his discharge," as used in the first section of the act of August 14, 1888, chapter 890, is to be regarded as equally applicable to the date when the term of enlistment of the applicant expired, and to the date when he would have received his discharge along with other enlisted men with whom he served, had he been present.

The *proviso* in the third section of that act is applicable to the latter section alone.

DEPARTMENT OF JUSTICE,
January 15, 1889.

SIR: By your letter of the 20th of December, 1888, you ask—

(1) Whether or not the words, "by reason of absence from his command at the time he became entitled to his discharge," as used in the first section of the act entitled "An act to re-

Enlisted Men of the Navy and Marine Corps.

lieve certain appointed or enlisted men of the Navy and Marine Corps from the charge of desertion," approved August 14, 1888, are to be regarded as applicable only to the expiration of the period of enlistment, or as equally applicable to the date when, had the applicant for relief under said act been present at the time and place when and where discharges were issued to other enlisted men with whom he had served, he would have received his discharge?

(2) Whether the *proviso* contained in section 3 of said act of August 14, 1888, is to be regarded as applicable to any case or cases arising under the first section of the same act, or only to such cases as are provided for in said third section.

The statute to be construed is a remedial one. Its purpose is to authorize the granting of discharges to a class of sailors and marines who, at the close of the last war, had done substantially their duty to their country, and chiefly failed, in not reporting for a discharge, to do their duty to themselves. Under the act a wide discretion is vested in the Secretary of the Navy, in order that full justice may be done, by granting or refusing discharges as the real merits of each case presented may demand. A liberal interpretation will conform to the intent of the law-makers. If the clause in the first section "by reason of absence from his command at the time he became entitled to his discharge," should be interpreted to apply only to those who had served out their term of enlistment, it would cut off a large majority of those for whose relief the act was passed. The language "at the time he became entitled to his discharge," if interpreted so as to limit the operation of the section to those entitled to discharge under the former laws, would render the section an absolute nullity, and would not include even those who had served out their term of enlistment; for even they would not become entitled to discharge, unless at the proper time and place, and in the proper manner, they were present to receive it. We are not authorized to insert after the words "became entitled to his discharge," the words "on account of expiration of term of enlistment." The language of the act is general and unlimited, and if from any cause the sailor or marine, if he had been present, could and would have been legally granted a discharge, he is entitled to the benefit of the act.

Enlisted Men of the Navy and Marine Corps.

The reason for discharge at the expiration of the term of enlistment stands upon no higher ground than the reason to discharge in order to reduce the force, or any other cause for which the sailor or marine could and would have been discharged if present to apply for it.

The act under consideration clearly intended to grant the same relief to the sailors and marines of the late war that had been granted to the soldiers under like circumstances by the acts of July 5, 1884 (25 Stat., 119), and the 17th of May, 1886 (24 Stat., 51). The report of the Committee on Naval Affairs of the House on the bill (House Report No. 220, first session, Fiftieth Congress), declares:

“The justice and expediency of applying the same general rules to the Army and Navy, in the matter of amending or correcting the military record of individuals, are so obvious that your committee deem no argument necessary to sustain the proposition.”

The first and second sections substantially embrace the same classes of the Navy as those of the Army that were relieved by the act of the 5th of July, 1884. The proviso to the first section of the present act is identical with that in the first section of the act of 1884. The class of sailors and marines in the third section of this act corresponds with the class of soldiers provided for in the act of 1886. The proviso to the third section of this act and to the act of 1886 are literally identical. The committee, by which this bill was reported, clearly used the acts of 1884 and 1886 as the model, in conformity to which the bill was drawn, so as to embrace the provisions of both acts in one. In carrying the proviso from the act of 1886, the word “act,” as it occurred therein, was copied with the rest of the proviso, doubtless through the inadvertence of not observing that the act of 1886 related only to the class embraced in the third section of this act, while the classes embraced in the first and second sections were provided for, as to the Army, by the act of 1884. To extend the proviso of the third section to the whole act would cut off a very large portion of those intended to be relieved by the first and second sections; it would make the whole proviso, as to the first section, useless tautology; it would leave many of the sailors and marines, who had returned to

Rescission of Contract.

the service and been honorably discharged, provided for in the second section, standing upon the rolls charged with desertion; it would leave many who died from wounds received in battle stigmatized on the record as deserters. These, with many similar considerations, clearly establish that it was the intent of the law-maker (which is the law) that the word "act," in the third section, from an interpretation by the subject-matter, the spirit and reason, and the effect and consequence of the law, means "section."

I therefore answer your first inquiry, that the words "by reason of absence from his command at the time he became entitled to his discharge," are to be regarded as equally applicable to both classes referred to in your first question.

I answer your second inquiry, that the proviso contained in the third section is applicable to that section alone.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

RESCISSON OF CONTRACT.

Upon the facts stated: *Advised that a contract entered into on the 15th of December, 1887, between Charles Rohr and the Bureau of Animal Industry of the Department of Agriculture, may be considered rescinded and no longer binding upon said Bureau after June 30, 1888.*

DEPARTMENT OF JUSTICE,

January 19, 1889.

SIR: I have considered the communication of the Commissioner of Agriculture, dated the 15th instant, transmitted to me by you, requesting my opinion whether a certain contract, dated December 15, 1887, between Charles Rohr, of Baltimore County, in the State of Maryland, of the first part, and the Bureau of Animal Industry of the Department of Agriculture, of the second part, has expired by limitation of law or has been rescinded by such Department and is no longer binding. I have a copy of the contract, and, also a copy of a communication dated June 7, 1888, from D. E. Salmon, Chief of the Bureau of Animal Industry, to the said Charles Rohr, notifying him that the contract would expire by limitation of law on June 30, 1888.

Consular Fees.

No definite period of time is fixed in the contract during which either party is to be bound by its terms or entitled to its benefits; this being so, either party to the contract was at liberty to put an end to it on reasonable notice to the other. (*Palmer v. Vandenbergh*, 3 Wend., 193; *McLees v. Hale*, 10 Wend., 426.)

Although the notice hereinbefore mentioned from D. E. Salmon, Chief of the Bureau of Animal Industry, to the said Charles Rohr did not in terms contain a rescission of the contract, it informed him that the Bureau would consider the contract at an end on June 30, 1888.

The notice so given would seem to have been a reasonable one as to time, and the contract may therefore be considered rescinded and no longer binding upon the Bureau of Animal Industry of the Department of Agriculture.

Very respectfully,

A. H. GARLAND.

The PRESIDENT.

CONSULAR FEES.

A certified consular invoice is required by law for the admission to entry of imported merchandise not subject to duty, excepting where Congress has expressly dispensed with that requirement.

The new edition of the Consular Regulations of 1888 contains provisions making the fee for a consular certificate to an invoice of merchandise not subject to duty official and returnable to the Treasury.

The fee for such certificate may be rendered official by Executive order, and specially included in the tariff of official fees under the Revised Statutes.

DEPARTMENT OF JUSTICE,
January 22, 1889.

SIR: Yours of the 21st ultimo and of the 3d instant, with inclosure, have been received, and in them you request an official opinion upon three propositions touching the subject of consular fees, which have arisen by reason of a recent decision of the United States Court of Claims in the claim of John S. Mosby, the former consul at Hong-Kong, China.

Attorney-General Cushing had occasion, in 1855, to write an excellent opinion upon this and other subjects relating to the consular service, in which he construed the act of March

Consular Fees.

1, 1855, (10 Stat., 623; 7 Opin., 243). This act was, however, wholly repealed by the act of August 18, 1856. (11 Stat., 65.)

The important and material sections of the latter act were transferred to and are now embraced in the several chapters of Title XVIII of the Revised Statutes.

The questions presented for consideration bear directly upon the commercial relations of the United States with foreign governments or their subjects, and the provisions of law above referred to must necessarily, therefore, be considered in connection with the laws regulating the importation of goods, whether free or dutiable, into the United States.

With this preliminary and casual reference to the law by which your propositions will be governed, I shall now answer your questions in their order:

"The court hold that the certificate to an invoice of merchandise not subject to duty is a non-official paper; that the Consular Regulations of 1874 and 1881 contain no provisions making the consular charge for such a certificate an official fee; but they intimate that the President may, in his discretion, prescribe fees for non-official acts, and thereby render such fees official. This leads to the inquiry whether the new edition of the Consular Regulations, formulated by the President in February, 1888, to go into effect April 1, 1888, contain any provision by virtue of which the fee for a consular certificate to an invoice of merchandise not subject to duty is made official and returnable to the Treasury. The paragraphs touching official fees and invoices are 491-508, and 636-632."

Merchandise shipped to the United States in transit to a foreign country, as indicated by manifests, bills of lading, or other documents, are not importations into the United States under the law, and consular invoices are not required.

Strictly speaking, therefore, importations under the statutes consist of goods that are dutiable and goods that are admitted free. There is no controversy as to the requirement of an invoice and the character of the consular fee in regard to dutiable importations. It will be observed that the law upon the subject of consular invoices is found in the statutes regulating the customs duties.

The answer, therefore, to the material part of the above

Consular Fees.

question depends upon the construction or application of the provisions of section 1 of the act of March 3, 1863 (12 Stat., 737) and of section 1 of the act of June 22, 1874, (18 Stat., pt. 3, p. 187.) The provisions of section 1 of the act of March 3, 1863, have been re-enacted in sections 2853, 2855, and 2860, of the Revised Statutes; but no part of the act of June 22, 1874, has been embraced in the Revised Statutes. It may be found, however, in volume 1 of the Supplement to the Revised Statutes, page 79.

These statutes are now in full force, and in effect they are prohibitory. No distinction is made in them between dutiable and free goods. Whether the goods belong to the one or the other class, they are alike importations. Nor are free importations included in the exceptions under which merchandise may be admitted to entry without the invoices required by these statutes, although some exceptions are expressly made. The law-makers have not included free goods within the exceptions, and they can not be admitted to entry without the consular invoice required, unless the strict and familiar rule of construction of statutes is relaxed for the purpose. This can not be done.

The first section of the act of March 3, 1863, expressly prohibits the admission to entry of goods unless the consular invoice accompanies them. Section 9 of the act of June 22, 1874, provides, "that except in the case of personal effects accompanying the passenger, no importation exceeding one hundred dollars, in dutiable value, shall be admitted to entry without the production of a duly certified invoice thereof as required by law." * * *

The State and Treasury Departments, which have cognizance of these matters, have, according to the information transmitted by you, construed the above statutes to mean that "the fact that imported goods are entitled to free entry does not excuse the production of a certified invoice." And in 1872 the question arose, and the Secretary of the Treasury on the 8th of November in that year so decided, and notified the collector of customs at San Francisco, Cal., by letter of such decision.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most

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respectful consideration, and ought not to be overruled without cogent reasons (*Edwards vs. Darby*, 12 Wheat., 210; *United States vs. The State Bank of North Carolina*, 6 Pet., 29; *United States vs. McDaniel*, 7 ib., 1). The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draughtsmen of the laws they are afterwards called upon to interpret." (*United States vs. Moor*, 95 U. S. R., 763.)

And the above rule of contemporaneous construction of statutes, by those charged with their execution, applies in all cases of ambiguity and doubt. (*Swift Co. vs. United States*, 105 U. S. R., 695, and the cases therein cited; *United States vs. Philbrick*, 120 U. S. R., 52; *United States vs. Hill*, ib., 169.)

It is not necessary to discuss the reasons why certified consular invoices should or should not be required for free importations, inasmuch as the conclusion has been reached, as will be perceived from the above remarks, that such invoices are required by law.

The President may, therefore, in his discretion, prescribe the fee for a consular certificate to an invoice of merchandise not subject to duty as official and require it to be returned to the Treasury. And even if those certified invoices were not required by law, the President is authorized in his discretion, under section 1745 of the Revised Statutes, to designate the service of the consul in certifying such invoices as official, and also to declare the fee prescribed therefor to be official, and require it to be accounted for to the Treasury.

Upon my first examination of the paragraphs of the Consular Regulations of 1888, referred to in your communication, I was under the impression that item 36 of paragraph 508 included a special reference to the section of the Revised Statutes in which invoices for dutiable goods are required and the fee prescribed. But, upon further investigation and reflection, I find this impression to be erroneous. Item 36 of paragraph 508 is broad enough in its provisions to include the fee for a consular certificate to an invoice of merchandise not subject to duty, and to make such fee official and returnable to the Treasury.

In answer to your second inquiry, I beg to say, that I see

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no reason why the fee for certifying an invoice may not be rendered official by Executive order and specially included in the tariff of fees in accordance with section 1745 of the Revised Statutes.

The answers to your first and second inquiries render it unnecessary for me to express an opinion upon the third proposition submitted.

I am of the opinion therefore—

(a) That a certified consular invoice is required by law for the admission to entry into the United States of goods and merchandise not subject to duty, except in the instances in which Congress has expressly dispensed with the requirement of the same.

(b) That the new edition of the Consular Regulations of 1888 contains provisions which make the fee for consular certificate to an invoice of merchandise not subject to duty official and returnable to the Treasury.

I am also of the opinion that the fee for certificates to consular invoices may be rendered official by Executive order, and specially included in the tariff of official fees under the Revised Statutes.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

CHEROKEE CITIZENSHIP.

Where a North Carolina Cherokee Indian removed into the Cherokee Nation and permanently located there subsequent to the date of the act of the Cherokee legislature of 1870, relating to the admission to citizenship in that nation of North Carolina Cherokees, and made proof as in said act is required, and was thereupon admitted to citizenship by the chief-justice under its provisions, he thereby became fully invested with the rights, privileges, and immunities of Cherokee citizenship.

The action of the chief-justice, under the act, is final, and leaves nothing for review.

The Interior Department is under no obligation to respect a later decision of the Cherokee authorities made pursuant to the order of a commission subsequently established.

Cherokee Citizenship.

DEPARTMENT OF JUSTICE,

January 23, 1889.

SIR: I have received your communication of the 7th instant, which is in the following language.

"I have the honor to hand you herewith a copy of an act of the legislature of the Cherokee Nation in 1870, in relation to the admission to Cherokee citizenship of North Carolina Cherokees, in which it is provided: that all such Cherokees as may hereafter remove into the Cherokee Nation, and permanently locate therein as citizens thereof, shall be deemed as Cherokee citizens, provided such Cherokees shall enroll themselves before the chief-justice of the supreme court within two months after their removal in the Cherokee Nation and make such showing to him of their being Cherokees, and the said chief-justice is hereby required to report the number, names, ages, and sex of all persons admitted by him to be entitled to Cherokee citizenship, and also the number, names, ages, and sex of the persons denied the rights of Cherokee citizenship, to the annual session of the national council in each year; and thereupon to solicit your opinion upon the following questions:

"(1) If a North Carolina Cherokee removed into the Cherokee Nation and permanently located there subsequent to the date of the act, and within two months of his removal made satisfactory proof of his character as a Cherokee to the chief-justice, and was by him admitted, was he thereby fully invested with the rights, privileges, and immunities of Cherokee citizenship? or did there remain in the council or legislature or other authorities of the Cherokee Nation a right of supervision over the act of the chief-justice, so that the question remained dependent on future determination by superior authority?

"(2) If a North Carolina Cherokee admitted within the time and according to the terms of the foregoing act, after permanent location according to its requirements, should be some years subsequently declared by a commission, established by the Cherokee legislature to inquire into the claims of residents in the nation to citizenship, to be not properly entitled to such citizenship, is the Department under obliga-

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tion to respect the later decision by the Cherokee authorities, and, upon the demand of the principal chief, to remove such person as an intruder under the existing treaties between the United States and the Cherokee Nation?"

In answer to the first question propounded, I beg leave to say, that a North Carolina Cherokee removed into the Cherokee Nation as stated in such question, and who made proof as therein named, was thereby fully invested with the rights, privileges, and immunities of Cherokee citizenship. This was a species of naturalization resorted to by the legislature of the Cherokee Nation in 1870, and would stand to that extent precisely as a judgment of a court under an act of Congress conferring citizenship in the United States upon a foreigner or an alien, and closes all inquiry, and, like every other judgment, is complete evidence of its own validity. (*Spratt v. Spratt*, 4 Peters, 406.) Or, to state it a little more broadly, a judgment in this proceeding by the chief-justice of the supreme court of the Cherokee Nation was in the exercise of a special jurisdiction conferred upon him, and comes within the familiar rule that when a special tribunal is authorized to hear and determine certain matters its decisions within the scope of its authority are conclusive.

I find from the papers submitted no authority to supervise this act of the chief-justice, and I certainly think there is none. The right of citizenship is determined in this proceeding and becomes an adjudicated matter, and to leave it an open question for review by the legislature or the council or other authority would be to unsettle every right of citizenship based upon that act. In this, as in all other things, there must be a termination—an ending—somewhere, and the proper construction of this act is that the judgment of the chief-justice, rendered according to the terms of such act, is the final determination, and leaves nothing for review. These principles of law would apply, if possible, with more force here than in ordinary cases, because it appears from the papers submitted that the Cherokee council invited the North Carolina Cherokees to come to the Cherokee Nation and to become identified therein as citizens, and this plan of making them citizens was adopted to carry out the purpose of that invitation.

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And it therefore follows, as a consequence, in reply to your second inquiry, that the Department of the Interior is under no obligation to respect the decision of the Cherokee authorities in pursuance of the order of a commission established by the Cherokee legislature to inquire into the claims to citizenship of these persons adjudged to be citizens, as designated in the first-named inquiry. The right of citizenship can not be forfeited by legislative act directly or indirectly no more than can be the right of property.

As requested by you, I herewith return the copy of the law of the Cherokee Nation.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

TIMBER ON INDIAN LANDS.

An Indian allottee of land under the act of February 8, 1887, chapter 119, does not possess the right to cut and sell merchantable timber standing upon the land, excepting such as it may be necessary to cut in clearing the premises for agricultural or grazing purposes, or to erect suitable buildings thereon.

Until the second patent provided for by the fifth section of said act is granted, it is the duty of the Interior Department, by virtue of the legal title remaining in the Government and the trust relation assumed by it, to prevent the cutting of timber except for the above-mentioned purposes, whether the land is or is not within an Indian reservation.

DEPARTMENT OF JUSTICE,

January 26, 1889.

SIR: By your letter of the 21st of January, 1889, you ask:

"(1) Whether an allottee under the act of February 8, 1887 (24 Stat., 388), possesses the right to cut and sell merchantable timber, whether pine or hard wood, standing upon the lands allotted to him and held under the trust patent by which the title is reserved for twenty-five years or longer to the United States.

"(2) If such allottees possess the right of sale to any extent, is the Department authorized to exert any control over the disposition of the property, except when the land still re-

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mains within an Indian reservation within its jurisdiction under the statute?"

The Indians when organized as tribes, under the former policy of the Government, have been treated as domestic dependent nations under the guardianship of the United States. That their condition would be made better if, instead of their separate national organization, with the nomadic and improvident habits incident to it, they were severally qualified as speedily as possible for self-reliant citizenship in the several States and Territories and endowed with political rights, is shown to be the conclusion reached by Congress, which inspired the passage of the act to which you refer. The act is intended to change the wandering, improvident, and semi-civilized hunter to the domestic, industrious, and enlightened citizen. The first step adopted to promote this end is to give to each Indian a home, with a sense of ownership. The act contemplates that these homes shall, in the first instance, be agricultural. The first industries are to be farming and grazing, as shown by the first section of the act, for the land to be allotted is to be such as is "advantageous for agricultural and grazing purposes." In this contemplated new mode of life the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in this act. The separate manhood of each Indian is to be recognized, but still subject for a time to the care and supervision of the Government as trustee or guardian. The real estate falling to each allottee is not intended to be used during the period of the guardianship for speculative purposes, but is so conditioned that in their period of wardship and tutelage the Indians shall not be subject to the danger of entering into an unequal competition with the whites in the field of traffic and general business outside of agriculture and grazing. The fifth section of the act provides for two different patents to be given to each allottee for the same land; the first to be "of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according

Timber on Indian Lands.

to the laws of the State or Territory where such land is located. The second is, "that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

Prior to the issuing of the second patent the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe. For twenty-five years or longer the obligation exists to see that the intent of the law shall be faithfully carried out, and no unlawful waste committed either by the *cestui qui trust* or any one else. During that period the land is intended to be used for agricultural and grazing purposes. Whatever timber may be necessarily cut or used for the promotion of these purposes the trustee should permit. To sell the timber growing on the land, or to cut it for sale for commercial purposes, except such as may be cut in clearing the land or for improvements to be erected thereon, would be inconsistent with the obligation of the trustee to preserve and protect the trust. And the ruling in *United States v. Cook* (19 Wall., 591) would seem to meet this question. The opinion rendered by me July 21, 1885, to the Secretary of the Interior on the question of *leasing Indian lands for grazing purposes* in its logic reaches this proposition.

Your first inquiry is therefore answered, that the allottee does not possess the right to cut and sell merchantable timber, except such as it may be necessary to cut in clearing the land for agricultural or grazing purposes or to erect suitable buildings thereon.

To your second inquiry I reply, that by virtue of the legal title remaining in the Government and the trust relation assumed by it until the second patent is granted, it is the duty of the Department to prevent the cutting of timber except for the purposes above indicated, whether the land is or is not within an Indian reservation.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

Naval Vessels—Armament.

NAVAL VESSELS—ARMAMENT.

The words "exclusive of armament," as used in the first section of the act of August 3, 1886, chap. 849, are not to be understood as excluding the offensive armament, such as guns, torpedoes, etc., *only*; the term "armament" comprehending, besides those articles, such shields and protections as are directly and necessarily connected with the efficient and safe working thereof.

DEPARTMENT OF JUSTICE,

January 31, 1889.

SIR: By your letter of the 14th of January, 1889, you ask:
"(1) Whether the words 'exclusive of armament,' as used in the first section of said act of August 3, 1886, with reference to the 'armored vessels,' the construction of which is therein authorized, are to be understood as excluding only the offensive armament, consisting of such articles as guns, torpedoes, etc., with the apparatus for serving them; or

"(2) Whether the word 'armament,' as applied to said armored vessels, viz, the armored battle-ship *Texas* and the armored cruiser *Maine*, is to be understood as including, besides guns, torpedoes, etc., and the apparatus for serving them, armor-plates for turrets, sighting-towers on turrets, turret and breastwork tops, and breastworks below turrets to protect the turning and loading gear; in other words, such portions of *armored protection* as are directly and necessarily connected with the efficient and safe working of the offensive armament, and constitute, practically, an indispensable portion of the *defensive armament*."

The first clause of the first section of the act of August 3, 1886 (24 Stat., 215), is:

"First. Two sea-going, double-bottomed, armored vessels of about six thousand tons displacement, designed for a speed of at least sixteen knots an hour, with engines having all necessary appliances for working under forced draught, and costing, including engines and machinery and excluding armament, not more than two million five hundred thousand dollars each. Said vessels shall have each a complete torpedo outfit and be armed in the most effective manner."

Naval Vessels—Armament.

The following provisions relating to the same subject are found in the fourth section of the act of the 3d of March, 1887 (24 Stat., 594):

“For expenditure towards the construction and completion (exclusive of armament) of * * * the vessels authorized by the act of August third, eighteen hundred and eighty-six, two million four hundred and twenty thousand dollars.

“Towards the armament * * * of the vessels authorized by sections one and two of the act of August third, eighteen hundred and eighty-six * * * two million one hundred and twenty-eight thousand three hundred and sixty-two dollars.

“Towards procuring, testing, and delivering the armor and gun steel for the vessels authorized by section one of the act of August third, eighteen hundred and eighty-six * * * four million dollars.”

The statute first cited refers to the construction of the vessels alone, exclusive of armament. The above quotations from the act of 1887 contemplate three different stages of progression towards the final qualification of the vessels for actual use. First, “the construction of the vessels;” second, “towards the armament of the vessels;” and, third, “towards the procuring, testing, and delivering of the armor and gun steel.” The exclusion of the armament from the construction of the vessels in the first act shows the armament is not to be regarded as part of the construction of the vessels. The separate appropriations for the armament and for the procuring, testing, and delivering of the armor and gun steel in the last act, together with the last clause in the first act, show that the offensive arms and torpedo outfit are not understood as including all that is contained in the word “armament.” That word, therefore, is intended to embrace an element in the completely fitted and armed vessel which is not included in the construction of the vessel nor in the offensive weapons known as guns, arms, and torpedoes. The armament contemplated in the appropriation acts is intended to be broader than the mere word “arms,” and includes certain elements which are intermediate between the finished vessel and the final equipment with guns, arms, and torpe-

Naval Vessels—Armament.

does. The construction of the vessel includes all that is necessary to finish and qualify it for use for all purposes as a vessel, which embraces the armor for protection of the ship itself but does not include the shields or protections which in battle only are necessary for the safety of the crew or for the safety of the offensive implements of war, nor such additional constructions as are intended for such emergencies only. After the vessel is thus finished with the material, strength, endurance, and power of resistance contemplated by the act it may be compared to a well-developed man, with vigor to march, strength to bear fatigue, and fortitude to endure pain, who is about to be mustered into the military service, but, except these qualifications, with no preparation to specifically fit him for offensive war-like service. A merchant vessel constructed of the material, with the speed, strength, endurance, protection, and the capability to passively bear the amount of violence anticipated, would be the constructed vessel provided for in the act. But the acts intend the vessel should be used for offense; that there are shields and protections to be specially provided for the safety of those engaged in battle and for the protection of the arms and implements which are only useful for such emergencies; also that there may be additional attachments needed to be made to the constructed vessel to enable those engaged in naval warfare to intelligently and effectively use the implements of war, and that there may be additional protections necessary specially for these additional constructions. None of these latter would constitute a part of the construction of the vessel, neither would they be arms, guns, or torpedoes, nor the apparatus for serving them; and yet they would come under the signification of the term "armament."

I therefore answer your first inquiry in the negative, and your second in the affirmative.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

Illegal Fees Paid Customs Officers.

ILLEGAL FEES PAID CUSTOMS OFFICERS.

When a person at different times between April, 1882, and October, 1887, paid to customs officers, by deductions from drawbacks allowed him, alleged illegal fees, but gave no notice of dissatisfaction and took no appeal from the decisions of such officers to the Treasury Department: *Advised* that he can not recover back such fees by suit.

DEPARTMENT OF JUSTICE,
February 2, 1889.

SIR: By your letter of the 28th of January, 1889, you submit for my opinion substantially the inquiry whether a person who, at different times between April, 1882, and October, 1887, has paid, by deductions from drawbacks allowed him, alleged illegal official fees and extra expenses, but who did not give notice of dissatisfaction, nor appeal from the decision of the collector, can recover by suit such alleged illegal fees and expenses.

The laws authorizing drawbacks are a part of the general system of customs-revenue laws. The duty of administering them is committed to the customs revenue officers as a part of their general duties. The fees and expenses incident to the discharge of those duties are customs-revenue fees and expenses. The extra expenses, if any were charged, are expressly provided for by the last clause of the Treasury Regulations of 1884, No. 970. Section 3057 of the Revised Statutes authorizes the Secretary of the Treasury to make such regulations, not inconsistent with law, as may be necessary to carry into effect the laws relating to drawback.

Section 2932 of the Revised Statutes provides:

"The decisions of the respective collectors of customs as to all fees, charges, and exactions, of whatever character, * * * claimed by them, or by any of the officers under them, in the performance of their *official duty*, shall be final and conclusive against all persons interested in such fees, charges, or exactions, unless the like notice (as provided in the preceding section) that an appeal will be taken from such decision to the Treasury, shall be given within ten days from the making of such decisions."

This section embraces all fees, charges, and exactions claimed by the collectors, and the officers under them, in the

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discharge of their general duties as revenue officers. If a special duty, not relating to the revenue, should be by law required of such an officer, such service might not come within its provisions; but it clearly intends to subject the right to collect back alleged illegal official fees and charges paid to customs revenue officers to the same restrictions that are imposed by section 2931 as to alleged errors in the classification of goods and rates of duty on imported merchandise. The reason of the law is as applicable to one as to the other. If the exporter claiming the drawback expresses no dissatisfaction with the fees and expenses charged at the time they are paid, nor for years after, a subsequent claim would be defeated, as a voluntary payment, and be regarded as an acquiescence or ratification of the action of the officer, and there could be no recovery. The law prescribes the only mode by which he can avoid the consequences of a voluntary payment, which is, that he shall give notice of dissatisfaction and appeal to the Secretary of the Treasury. In the case submitted this has not been done. The law certainly does not contemplate that after the proper officers have liquidated the amount of the drawback, and the complainant, without dissent, has accepted the liquidation and received his money, after the transaction has been closed, it can, at an indefinite period thereafter, be re-opened on account of alleged excessive fees and expenses, in the face of a statute so plain in its provisions as section 2932.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

PAYMENT OF CLAIMS.

In September, 1887, H. entered into a contract with the Quartermaster's Department to perform certain work, but afterwards, being in default, it was arranged that his bondsmen, C. and R., should take charge of and complete the work; and in pursuance of this arrangement H. executed and delivered a power of attorney to them, by which they were authorized to receive and receipt for the money due on the contract. C. and R. signed receipted vouchers for the balance due: *Advised* that the Department may recognize the power of attorney of H., and that payment to C. and R. upon the receipted vouchers thereunder will discharge the Government.

Payment of Claims.

DEPARTMENT OF JUSTICE,

February 19, 1889.

SIR: By your letter of the 16th of February, 1889, you ask "whether payment should be made to James S. Culver, as proposed by the Quartermaster-General in his indorsement of the 13th instant."

The inquiry arises upon the following facts: On the 7th of September, 1887, a contract was made between the United States and George D. Hullinger & Son for the erection of certain buildings at Fort Riley. On the 9th of January, 1888, it appears from a letter of the Quartermaster-General, in charge at that post, that the contractors were in default, and were unable to perform the contract; that J. S. Culver and Henson Robinson were their bondsmen; that it had been agreed between the principals and the contractors that the bondsmen should take charge of and complete the work. In pursuance of that agreement George D. Hullinger & Son executed and delivered a power of attorney to J. S. Culver and Henson Robinson, authorizing them to receive and receipt for the money on the contract. On the 9th day of September, 1888, Culver and Robinson made an assignment of the balance due on the final estimates to Henry S. Davis, jr., and, as attorneys of George D. Hullinger & Son, signed received vouchers for the balance. J. S. Culver had been the managing partner of the firm of Culver & Robinson in the completion of the work, and by the contract between him and Robinson he alone was authorized to sign the firm name and take entire charge of the business of the firm. The power of attorney of Hullinger & Son to Culver & Robinson does not authorize the latter to assign the money to be paid on the contract, nor to empower any one else to receive it. It does fully authorize Culver & Robinson to receive the money, and stands unrevoked.

Section 3477 of the Revised Statutes declares all powers of attorney for receiving payment of claims against the Government void unless made and executed after the allowance of the claim.

In the case of *Goodman v. Niblack* (102 U. S. R., 560) it is ruled that the "sole purpose" of the above section "was to

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protect the Government, and not the parties to the assignment."

In the case of *Bailey v. United States* (109 U. S. R., 439), in construing the same section, it is ruled :

"A mere power of attorney given before the warrant is issued—so long at least as it is unexecuted—may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact. And it may be so regarded by the officers of the Government, whose duty it is to adjust the claim and issue a warrant for its amount. But if those officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, the claimant can not be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent. To hold otherwise would be inconsistent with the ruling heretofore made, and with which, upon consideration, we are entirely satisfied—that the purpose of Congress, by the enactments in question, was to protect the Government against frauds upon the part of claimants and those who might become interested with them in the prosecution of claims, whether before Congress or the several Departments."

You may therefore, as the interests of justice in your own judgment dictate, recognize the power of attorney of Hullinger & Son to Culver & Robinson ; and if you deem it right to do so, the received vouchers signed by Culver & Robinson as attorneys of Hullinger & Son, as submitted with your letter, if properly filled, will discharge the Government. As the power of attorney is a joint one, it requires that the payments shall be joint to Culver & Robinson. The warrant should, therefore, be made to them jointly. But as J. S. Culver is the managing member of the firm, and he alone is authorized to sign the name of the firm, the warrant when issued should be delivered to him. As he appears to be authorized to conduct the business of the firm, and sign its name, his endorsement of the name of the firm on the warrant would be a valid transfer.

This substantially answers the legal questions submitted

Contract with Pottawatomie Indians.

in your communication, but whether you *should* issue the warrant or not, as above suggested, is entirely within your official discretion.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CONTRACT WITH POTTAWATOMIE INDIANS.

The Secretary of the Interior may approve a certain contract of E. John Ellis with the Pottawatomie Indians, as recommended by the Commissioner of Indian Affairs.

DEPARTMENT OF JUSTICE,
February 26, 1889.

SIR: I am in receipt of your favor of the 25th instant, which reads as follows:

"I have the honor herewith to transmit to you a contract in duplicate between A. F. Navarre, John Anderson, and Stephen Negonquit, representing the citizen band of Pottawatomie Indians, on the one part, and E. John Ellis, on the other part, and therewith a communication from the Commissioner of Indian Affairs, recommending my approval of this contract (in duplicate), and also therewith accompanying papers, including four opinions heretofore given to this Department by you in respect to the right of this Department to approve the contracts; and, in view of the statements made by the Commissioner of Indian Affairs, respectfully to inquire whether it is now admissible under the statutes for this Department to approve this contract, as recommended to be done, limiting such approval to the services which remained unperformed at the time when your former opinion was given, and not embraced in the act of April 4, 1888, entitled 'An act to enable the Secretary of the Interior to pay certain creditors of the Pottawatomie Indians out of the funds of said Indians.'"

And in reply to the question propounded by you I beg to submit that, in the opinion I rendered to you on the 16th day of April last, I held that the act of April 4, 1888, referred to by you in your communication now before me, was a curative

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act, and made good the contract under which Mr. Ellis claimed, the same having been held by me in different opinions as being an invalid contract for reasons stated in those opinions and not necessary to be repeated here. While this act referred to had in mind especially the services then rendered by Mr. Ellis, still it made valid, in my opinion, the contract for services that he had performed, as well as those he should perform in future under it; in other words, it validated the contract for all purposes. The history of this act, as gathered from two reports by the Committee on Indian Affairs in the House of Representatives touching this very subject matter (Reports No. 160 and 1702, first session Fiftieth Congress), sustains, I think, to the fullest extent the view here expressed by me; and I am therefore of the opinion that you can recognize the contract and act under it, and that the action of the Commissioner of Indian Affairs, as disclosed by his letter of the 16th instant, is correct.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CUSTOMS DUTIES.

In February and March, 1886, certain liquors (which had been manufactured in the United States, in a bonded manufacturing warehouse established under the provisions of section 3433, Revised Statutes, out of both domestic and imported spirits that were removed to such warehouse without payment of either the internal-revenue or customs duties, and which liquors had been exported therefrom) were imported into New York and assessed with the duty prescribed by the statute (Schedule H) as foreign liquors: *Advised* that—the liquors being of the manufacture of the United States and once exported—section 2500, Revised Statutes, affords the rule under which to levy duties thereon. That section does not contemplate the levying of different rates of duty on the several different ingredients of which an article may be composed; it is the product that is to be taxed, not its constituent ingredients.

DEPARTMENT OF JUSTICE,
March 1, 1889.

SIR: By your letter of the 14th of February, 1889, you request my views on a question in which you submit the fol-

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lowing facts: One C. M. Roof imported into New York in February and March, 1886, from Bermuda, certain liquors styled "bay rum," "London Club rum," "St. Croix rum," "Jamaica rum," "brandy," and "Hennessy and Otard brandy," which liquors upon importation were assessed with the duty prescribed by the statute (Schedule H for foreign liquors).

The importer, however, protested and appealed to the Department under the provisions of section 2931 of the Revised Statutes, and claimed that the liquors were of domestic manufacture upon which no internal-revenue tax had been paid, and that they were entitled to entry under section 2500 of the Revised Statutes, as contained in the act of March 3, 1883; that is, upon the payment of a duty equal to the tax imposed by the internal-revenue laws upon such articles.

Upon investigation it was ascertained that the liquors in question had been manufactured in the United States, in a bonded manufacturing warehouse established under the provisions of section 3433 of the Revised Statutes, from domestic spirits and imported rums and brandies which had been removed to such manufacturing warehouse without payment of either the internal-revenue tax or the duties due under the tariff.

Section 3433 of the Revised Statutes provides for bonded manufacturing warehouses. The object intended to be promoted by such bonded manufacturing warehouses was domestic manufacturing for exportation. In order that the manufacturers might be able to compete with others successfully in foreign markets, the material used in the product was relieved from both customs and internal-revenue tax. The section contemplates the product may be composed partly of domestic material and partly of imported foreign material. The first clause of the section is: "All medicines, preparations, compositions, perfumery, cosmetics, cordials, and other liquors manufactured *wholly or in part* of domestic spirits intended for exportation."

A later clause of the same section is: "Any materials imported into the United States may, under such rules as the Secretary of the Treasury may prescribe, and under the direction of the proper officer, be removed in original pack-

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ages from on shipboard, or from the bonded warehouse in which the same may be, into the bonded warehouse in which such manufacture may be carried on, for the purpose of being used in such manufacture, *without payment of duties thereon* and may there be used in such manufacture."

This clause substantially declares that material imported which is manufactured under the section may be used in the product "without payment of duties thereon." The product or manufactured article for export, therefore, whether composed wholly or in part of domestic material, is free from taxation as a manufacture of the United States. The law has placed such safeguards around bonded manufacturing warehouses as were thought necessary to avoid fraudulent or collusive manufacturing or exportation under its provisions. After the exportation is completed, the operative force of the provisions of this section is exhausted. The general rule provided by the act of 1883 (free list, clause No. 649) is, that "articles the growth, produce, and manufacture of the United States, when returned in the same condition ~~as~~ exported," shall be free. An exception to this rule is found in section 2500 of the Revised Statutes, which is a part of the customs-revenue laws. That section provides:

"Upon the re-importation of articles once exported, of the growth, product, or manufacture of the United States, upon which no internal tax has been assessed or paid, or upon which such tax has been paid and refunded by allowance or drawback, there shall be levied, collected, and paid a duty equal to the tax imposed by the internal-revenue laws upon such articles."

Articles grown, produced, or manufactured "*within* the United States" are regarded, in the language of the customs laws, as the growth, production, and manufacture of the United States.

The articles referred to in your communication, as I understand, you find as a fact were manufactured in the United States, and that they were exported and re-imported. If so, so far as the importations are dutiable section 2500 of the Revised Statutes affords the rule under which to levy the duties thereon.

The communication of the naval officer, in which he sug-

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gests an analysis of the manufactured articles and the imposition of different rates of duty on the several elements of which each particular article is composed, can not be entertained, for section 2500 of the Revised Statutes imposes a uniform tax upon the product or manufacture as an entirety. It does not contemplate the levying of different rates of duty on the several different ingredients or material of which a single article may be composed. It is the product or manufactured article that is to be taxed, not its constituent ingredients.

That the manufacturing bonded warehouse system might be used fraudulently to evade the revenue is no sufficient reason to justify an unnatural construction of the statutes. It must be assumed that the law-makers have placed around the subject such guards as they believed would be sufficient to avoid the schemes of dishonest men. If a manufacture for exportation, or the exportation, were only colorable, and used as a means to defraud the revenue, such manufacture and exportation might in law be treated as voidable, and none of the benefits of the bonded manufacturing warehouse system would accrue to the wrong-doer.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

OPINIONS
OF
HON. WILLIAM. H. H. MILLER, OF INDIANA.
APPOINTED MARCH 5, 1889.

ESTATE OF THOMAS CONNER.

C., having for several years been a beneficiary and resident in the United States Naval Asylum at Philadelphia, died in the asylum in August, 1888, intestate, leaving personal effects of the value of about \$12,000, which were turned over to the proper officer at the asylum agreeably to regulations prescribed by the Secretary of the Navy under section 4811, Revised Statutes, for the disposition of the property of decedents in such cases. In November, 1888, letters of administration were granted on C.'s estate under the law of Pennsylvania by the State court; and in December, 1888, an inquisition in proceedings in escheat was had in the State court, whereby his estate purported to be escheated to the Commonwealth of Pennsylvania. The escheator and the administrator apply to the Secretary of the Navy for delivery of the personal effects of the decedent now in possession of the officer of the asylum. It appearing that in April, 1834, the State ceded to the United States jurisdiction over the land occupied by the asylum: *Advised* that the proceedings of the State court granting administration of the estate of C., and escheating the same, were void for want of jurisdiction, and that neither the administrator nor the escheator has any right to the possession of such estate.

DEPARTMENT OF JUSTICE,
March 6, 1889.

SIR: By your letter of the 1st of February, 1889, and the papers with it transmitted, it appears that for some years Thomas Conner has been a beneficiary and permanent resident in the United States Naval Asylum at Philadelphia. On the 25th of August, 1888, he died intestate in the asylum.

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His personal estate at the time of his death was of the value of about \$12,000. On the 6th day of August, 1885, in pursuance of section 4811 of the Revised Statutes, the Secretary of the Navy had prescribed rules and regulations for the disposition of the estate of the beneficiaries who dwelt at and died in the asylum. By those regulations provisions are made for the discovery of the legal heirs of a decedent, if any such exist, and, if any are found, for the distribution of his personal estate. If no heirs are found, the money and the proceeds of the personal effects of the decedent are to be turned over to the pay officer, to abide the action of Congress as to its final disposition.

In the case of Thomas Conner's estate it appears that the search for heirs prescribed by the regulations has not yet been fully made. The estate is yet held for that purpose by the proper officers of the asylum.

On the 7th of November, 1888, letters of administration on the estate were granted, in accordance with the intestate laws of Pennsylvania, to William N. Ritchie, of Philadelphia.

On the 27th of December, 1888, an inquisition in proceedings in escheat was filed in the court of common pleas of Philadelphia, whereby the personal estate of the decedent purported to be escheated to the Commonwealth of Pennsylvania. The deputy escheator of Pennsylvania requests the Secretary of the Navy to deliver into his custody the books and other evidences of indebtedness which belonged to Thomas Conner, which are now in possession of the proper officer of the United States at the asylum. The administrator, by his attorney, joins in this request.

You submit, substantially, for my consideration under the above-stated facts, whether the deputy escheator of Pennsylvania and the administrator appointed by the State court have a legal right to the personal estate of Thomas Conner or any part of it.

The answer to this inquiry depends upon the solution of the question whether the State courts of Pennsylvania have jurisdiction of the titles to the estate of the decedent.

"It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of

Estate of Thomas Conner.

succession and distribution, wherever situated, as having no other locality than that of his domicile, and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated." (*Wilkins vs. Ellett*, 9 Wall., 741.)

The United States Naval Asylum was the domicile of Thomas Conner. If the jurisdiction of the State courts and the laws of Pennsylvania do not extend to that asylum, nor to the grounds appurtenant to it, the action of the courts in granting letters of administration and escheating the estate of the decedent, as a means of vesting the title to the possession of the personal property, is void.

On the 10th day of April, 1834, the State of Pennsylvania, by an act of its legislature duly approved, ceded the jurisdiction over the territory occupied by the asylum in which Conner lived and died to the United States, in pursuance of the first article of the Constitution of the United States, which provides:

"The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be*, for the erection of forts, magazines, arsenals, dock yards, and *other needful buildings*."

After the cession of any territory to the United States by a State, under this provision of the Constitution, the legislative power of Congress is exclusive, and the whole undiminished sovereignty over the territory ceded is vested in the United States. Although the territory in this case was and is within the external boundaries of the State of Pennsylvania, as to its laws and judicial tribunals, since the cession, it is extraterritorial and constitutes a part of the exclusive domain of the United States. Under this clause of the Constitution the ceded territory is legally held in the same category as the District of Columbia, which, under the same

Estate of Thomas Comer.

clause, was originally ceded in part by the State of Maryland and in part by the State of Virginia.

In *Cohens vs. Virginia* (6 Wheat., 427 and 428) Marshall, C. J., in discussing the effect of the cession by Virginia of a part of the District of Columbia, declares :

" Were any one State of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation.

* * * The solution, and the only solution, of the difficulty is that the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the State in which the act has been committed, the Government can not pursue him into another State and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as the local legislature for the fort or other place in which the offense might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort or other place in which the felony may have been committed could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know that the principle does not apply."

In the case of *Commonwealth vs. Clary* (8 Mass., 76), in which a cession by the State of Massachusetts to the United States of the ground for the arsenal at Springfield (substantially identical with the cession in this case by the State of Pennsylvania) was covered, the court ruled :

" On the facts argued in this case we are of opinion that the territory on which the offense charged is agreed to have been committed is the territory of the *United States*, over which the Congress have the exclusive power of legislation.
* * * It will be noticed that in this decision we make a distinction between the persons who actually dwell within the territory owned by the *United States* and the laborers and artificers employed therein who have their dwelling elsewhere."

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In the case of *Mitchell vs. Tibbets* (17 Pick., 302) the court in passing upon the effect of a like cession ruled :

"The provisions of the statute ceding jurisdiction of the navy-yard in Charlestown to the United States, being in the same terms and with the like qualification, we are of opinion that the law of Massachusetts on which this action is founded did not extend to and operate within that territory, and that consequently this vessel was not employed within this Commonwealth within the meaning and construction of the act."

On the 6th of March, 1841, the legislature of Massachusetts asked the opinion of the judges of the supreme court as to the rights and obligations of persons residing upon land ceded to the United States, and received a reply substantially that—

"Persons who reside on lands purchased by or ceded to the United States for navy-yards, forts, and arsenals, and where there is no other reservation of jurisdiction to the State than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the towns in which the lands are situated, nor are they liable to be assessed for their polls and estates to State, county, and town taxes in such towns, nor do they gain a settlement in such towns for themselves or their children by residence for any length of time on such lands, nor do they acquire by residing on such lands any elective franchise as inhabitants of such towns."

In the case of *Commonwealth vs. Young* (Brightly's Reports, 312), decided in the supreme court of Pennsylvania, in considering a like cession to the United States, the same principles are recognized. In Kent's Commentaries, 430, the principle is thus stated :

"It follows as a consequence from this doctrine of the Federal courts that State courts can not take cognizance of any offense committed within such ceded districts, and, on the other hand, that the inhabitants of such places can not exercise any civil or political privileges under the laws of the State, because they are not bound by those laws."

In 2 Story on the Constitution, sections 1226 to 1326, a like result is reached.

Indian School Service.

Attorney-General Cushing, in 6 Opinions of Attorneys-General, page 577, goes into a full discussion of the effect of such a cession, and concludes:

"The persons in the employment of the United States actually residing in the limits of the armory at Harper's Ferry do not possess the civil and political rights nor are they subject to the tax and other obligations of citizens of the State of Virginia." See also 7 Opinions, 628, and 16 Opinions, 468 to the same effect.

I concur in the views above stated.

The result follows that the action of the courts of the State of Pennsylvania in granting original letters of administration and escheating the personal estate of Thomas Conner, under the laws of Pennsylvania, was without jurisdiction and is void. The alleged administrator and deputy escheator have no right to the possession of any books, papers, or personal property of the decedent of which he died possessed. You should, therefore, proceed to execute the rules and regulations prescribed by the Secretary of the Navy with reference to such estates, and after those rules and regulations shall have been executed it will be your duty to report the facts with the result to Congress for such further action as it shall deem just.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

INDIAN SCHOOL SERVICE.

The 8th section of the act of June 29, 1888, chapter 503, making appropriations for the current and contingent expenses of the Indian Department, etc., had no effect on the then existing appointments of superintendents, teachers, etc., connected with Indian schools wholly supported by the Government. The incumbents of the various positions referred to were lawfully in the public service after that act went into operation, and are legally entitled to be paid for their services during such period.

DEPARTMENT OF JUSTICE,

March 13, 1889.

SIR: A communication to this Department from your predecessor, dated the 28th February, 1889, asks an opinion as

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to "whether the persons who have continued in the Indian school service and who have rendered service since the beginning of the current fiscal year are not legally entitled to be paid for such service?"

But for the act of 29th June, 1888 (25 Stat., 217, 238), making appropriations for the current and contingent expenses of the Indian Department, etc., no doubt would exist as to the right of the persons mentioned to compensation.

The eighth section of that act authorizes the appointment of a "Superintendent of Indian Schools," prescribes his qualifications, duties, and powers, and is in the following words:

"That there shall be appointed by the President, by and with the advice and consent of the Senate, a person of knowledge and experience in the management, training, and practical education of children, to be superintendent of Indian schools, who shall, from time to time, and as often as the nature of his duties will permit, visit the schools where Indians are taught, in whole or in part, by appropriations from the United States Treasury, and shall, from time to time, report to the Secretary of the Interior what, in his judgment, are the defects, if any, in any of them in system, in administration, or in means for the most effective advancement of the children in them towards civilization and self-support; and what changes are needed to remedy such defects as may exist; and shall, subject to the approval of the Secretary of the Interior, employ and discharge superintendents, teachers, and any other person connected with schools wholly supported by the Government, and with like approval make such rules and regulations for the conduct of such schools as in his judgment their good may require. The Secretary of the Interior shall cause to be detailed from the employés of his Department such assistants and shall furnish such facilities as shall be necessary to carry out the foregoing provisions respecting said Indian schools."

Prior to the act of 29th June, 1888, the appointment and rate of compensation of persons employed in the Indian schools were under the direction and control of the Secretary of the Interior (see act 17th May, 1882, 22 Stat., 68, 85), but by that act the superintendent of Indian schools is, subject to the approval of the Secretary of the Interior, em-

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powered to "employ and discharge superintendents, teachers, and any other person connected with schools wholly supported by the Government."

On the very day the act of 29th June, 1888, went into effect the then Secretary of the Interior, by a communication to the Commissioner of Indian Affairs, directed that the persons employed in the Indian schools on the 30th June, 1888, should continue in that service at the compensation then prescribed until further orders.

It was not until the latter part of October, 1888, that the superintendent of Indian schools entered upon the duties of his office, and since that time, to quote from the case stated for opinion, "he has been engaged in the Indian school service as found by him upon entrance upon the duties of his office, and in submitting for the approval of the Department his action and recommendation regarding them."

It is true the act of 29th June, 1888, declares that the superintendents, teachers, and all persons connected with the Indian schools wholly supported by the Government shall be employed and discharged by the superintendent of Indian schools, subject to the approval of the Secretary of the Interior, but it would be very unreasonable to hold that it was the intention of the law to nullify all existing appointments and put a stop to the operations of the schools until a superintendent should be appointed and be able to select suitable persons to fill the various places made vacant by the act.

It is a well-settled rule of interpretation that the general language of a statute is, if possible, not to be taken in a sense which would produce a public inconvenience, the courts being always ready to presume that the legislative department of the Government could not have intended any such meaning to be placed on their words. The Supreme Court of the United States has repeatedly acted on this principle (*United States v. Kirby*, 7 Wall, 147; *Carlisle v. United States*, 16 Wall, 147; *Chew Heong v. United States*, 112 U. S., 536, 555).

It is clear, therefore, that the act itself had no effect on existing appointments, and that the incumbents of the various positions connected with the Indian schools wholly supported by the Government were lawfully in the public service

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after the act of 29th June went into operation, without the aid of the order of the Secretary of the Interior of that date, and should be paid accordingly.

I have the honor to be, your obedient servant,
W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

INDIAN ALLOTTEES—CITIZENSHIP.

The Indian allottees of the Kickapoo tribe, under the treaty of June 28, 1862, take their rights to the tracts allotted to them, which have not yet been patented, under and by virtue of the said treaty as extended by the act of August 4, 1866, chapter 897, and not under act of February 8, 1887, chapter 119.

Patents to those allottees to whom certificates were given under said treaty, but who had not received patents, should be issued under and in accordance with the terms of the treaty as extended by the said act of 1866.

The sixth section of said act of 1887, with respect to citizenship, applies to the Kickapoos who took allotments under the said treaty before the passage of that act as well as to those who have taken allotments since its passage and in pursuance of its provisions. But as the right of citizenship is only to be accorded after the patent is granted, the oath and proof required by the treaty, being prerequisites thereunder, must be taken and furnished.

DEPARTMENT OF JUSTICE,
March 14, 1889.

SIR: By your letter of the 7th of February, 1889, it appears that the treaty of the 28th of June, 1862, with the Kickapoo Indians (13 Stat., 623) in its first article provided for an allotment of lands in severalty to such members of the tribe as desired it and were qualified, and that the remainder of their reservation, not allotted, should be held in common by those of the tribe who did not desire an allotment. The second article provided for the issue of certificates to the allottees of such lands as should be set apart in severalty, on receipt of which those who took in severalty relinquished all further right to the lands assigned to the allottees in severalty or set apart for the residue of the tribe in common. The third article provides:

"At any time hereafter, when the President of the United States shall have become satisfied that any adults, being

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males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the land severally held by them to be conveyed to them by patent in fee-simple, with power of alienation, and may at the same time cause to be set apart and placed to their credit severally their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty; and on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That, before making any such application to the President, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families."

Prior to the 8th day of February, 1887, certificates for allotments were issued to one hundred and nine persons under the second article, and patents to fifty-two under the third article of the treaty, leaving at that date fifty-seven persons to whom certificates had been given who had not received patents. Under this state of facts you submit the following inquiries:

First. Do the one hundred and nine allottees of the Kickapoo tribe of Indians take their rights to the tracts allotted to them under the treaty of 1862, as above stated, so far as they have not yet been patented under said treaty, or under or by virtue of the act of 8th of February, 1887? (24 Stat., 388.)

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Second. Should the patents to be issued to the remaining fifty-seven allottees or their heirs, under the approved allotments made, be such in form as the treaty of 1862 provides for, and be issued only when in the discretion of the President they are capable of receiving them with safety to their interests, or should they be trust patents, such as are provided for under the act of 1887?

Third. In view of the following provisions of the general allotment law of 1887 for allotment of lands in severalty to Indians, viz: "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property;" whether, if the treaty of 1862 still remains in force, it is now necessary for the Kickapoo Indians to whom allotments have been made to apply to the courts for naturalization under the third article of the treaty, or does the act of 1887 secure to them the advantage of such naturalization without further act on their part, so that, if in the discretion of the President to issue their patents, they may be issued without that step being taken?

The act of the 8th of February, 1887 (24 Stat., 388), referred to in your inquiries, is described in its title as "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes."

This act provides a general system for the partition of lands which, at the time of its passage, were held *in common* by the Indian tribes. Its general provisions have no relation to lands that were held *in severalty* before its passage.

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Its operative provisions in the proceedings for allotments are by the terms of the act limited to *such lands as shall be allotted under the act.* The language of the second section is:

“That all allotments set apart *under the provisions of this act* shall be selected by the Indians,” etc.

The language of the third section is—

“That the *allotments provided for in this act* shall be made by special agents appointed by the President,” etc.

The fifth is the section of the act which provides for the issue of patents for the allotments and the trusts to which they shall be subjected. Its language is—

“That upon the approval of the *allotments provided for in this act* by the Secretary of the Interior he shall cause patents to be issued therefor in the name of the allottees,” etc.

The whole tenor of the act shows that so far as allotments had been made under any prior laws or treaties such allotments were not intended to be disturbed nor the rights of the allottees to such lands in any way modified or impaired.

The general purpose of the sixth section is to grant the personal rights of citizenship and the protection of the laws to such of the Indians as shall have received patents for allotments. This grant is no part of the system of partition, but is a consequence that is to follow it. The grant of civic rights under this section is extended so as to include not only those who might receive patents under the act of 1887, but also those who might have received or might be entitled to receive them “under any law or treaty.” The language of the section is—

“Every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or *under any law or treaty,*

* * * is hereby declared to be a citizen of the United States.”

This section neither increased nor diminished the requirements of the act of 1887, nor those of “any” other “law or treaty,” which are prerequisites to the obtaining of patents, nor does it incorporate into “any” other “law or treaty” any requirement, limitation, or condition as to allotments which had been made before the passage of the act of 1887. As to all the proceedings in partition, and the title to be conveyed

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by those proceedings, the act of 1887 is only applicable to lands held in common at the date of its passage. As to the personal rights of citizenship which are to accrue upon the delivery of a patent, the act embraces not only those who obtained patents under the act of 1887, but also the fifty-seven Kickapoo Indians who, prior to the passage of that act, had obtained allotments under the second article of the treaty of 1862.

I therefore answer, to your first inquiry, that the Indians therein referred to take their rights under the treaty of 1862 as extended by the act of August 4, 1886. (24 Stat., 219.)

To your second inquiry I answer, the patents to the fifty-seven allottees should be issued under and in accordance with the terms of the treaty of 1862, as extended by the act of 1886.

To your third inquiry I answer, the sixth section of the act of 1887, with reference to naturalization, is substantially identical with that of the treaty of 1862. It therefore applies to the allottees of the Kickapoo tribe who took allotments before the passage of the act of 1887 as well as to those who have taken since its passage in pursuance of its provisions. But, as the right of citizenship is only to be accorded after the patent is granted, the oath and proof required by the third article of the treaty of 1862, being prerequisites to the obtaining of the patent, are necessary to justify the exercise of the discretion vested in the President and must be taken and furnished.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

LEGISLATURE OF ARIZONA TERRITORY.

The legislative assembly of Arizona Territory can lawfully remain in session only for a period of sixty days' duration, such period including Sundays and all intermediate adjournments.

The word "sessions" in section 1852, Revised Statutes, as amended by the act of December 23, 1880, chapter 7, includes the whole period between the time fixed by law for the meeting of the legislative assemblies and their *sine die* adjournment, Sundays and intermediate adjournments not excepted.

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DEPARTMENT OF JUSTICE,

March 16, 1889.

SIR: By your letter of the 15th of March, 1889, you ask "whether the legislature of Arizona can continue in session after March 21, 1889, long enough to make up for Sundays and the time used in adjournments, or whether it must adjourn *sine die* sixty days from the date it was supposed to be organized."

Section 1852 of the Revised Statutes, as amended by the act of the 23d of December, 1880 (1 Sup. Rev. Stat., 586), provides:

"The sessions of the legislative assemblies of the several Territories of the United States shall be limited to sixty days' duration."

The word "sessions" in this section is used in the plural to correspond with the word "assemblies," so that the session of each of the assemblies of the several Territories shall be limited to sixty days. It is used by Congress concerning legislative bodies, and must be interpreted accordingly. The definition of the word by Worcester, as applicable to such bodies, is—

"The time between the first meeting of an assembly, and its prorogation or final adjournment; as, 'a session of Congress.'" In 2 Bouvier's Law Dictionary, 632, it is defined to be "the time during which a legislative body, a court, or other assembly sits for the transaction of business; as, a session of Congress which commences on the day appointed by the Constitution and ends when Congress finally adjourns before the commencement of the next session."

The session of a legislative body continues, notwithstanding an adjournment, until the final *sine die* adjournment, or the expiration of the legislative term.

"Where the two houses adjourn for more than three days, and not to or beyond the period fixed by the Constitution or law for the next regular session, the session is not thereby terminated, but *continues* until adjournment without day, or until the next regular session." (Barclay's Digest of 1871, p. 7.

From the origin of the Government all the laws passed between the legal organization and the meeting of Congress

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and a *sine die* adjournment have been treated as passed at the same session. The word "session" in the section quoted, therefore, includes the whole period between the time fixed by law for the meeting of the legislative assemblies of the several Territories and their *sine die* adjournment, including in the computation of time all intermediate adjournments.

In the computation of time Sundays are to be counted, as a general rule, to which the matter submitted is not an exception. Where Sundays are not to be counted, it arises from the special circumstances of the case, or is provided for by an express exception such as is found in the second clause of the seventh section of the first article of the Constitution, which provides :

"If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law."

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

VACANCY IN OFFICE.

A vacancy in an office which happens during a session of the Senate, but remains unfilled until a recess of the Senate occurs, may be filled by the President during such recess by a temporary appointment.

The rule is the same in the case of a new office, which is not filled during the session in which it was created. The President may fill the original vacancy existing therein by a temporary appointment made during the recess of the Senate.

DEPARTMENT OF JUSTICE,

March 20, 1889.

SIR: You ask me whether, when a vacancy in an office occurs during a session of the Senate, which is not filled until a recess of the Senate, you have power to fill it, during the recess, by a temporary appointment and commission.

The Constitutional provision on the subject is :

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Vacancy in Office.

This clause of the Constitution has been repeatedly construed by my predecessors, with uniform results.

On the 22d of October, 1823, a question was submitted to Attorney-General Wirt, which is thus stated by him (1 Opin., 631):

"It is the case, then, of a vacancy which arose during the session of the Senate, but which from the circumstance that has been mentioned, continues to exist in the recess. The question on which you ask my opinion is, 'whether under the Constitution you can fill the vacancy by a commission to expire at the end of the next session.'"

He interpreted the language "may happen during the recess" to be equivalent to "may happen to exist during the recess," and concludes:

"Now, if we interpret the word '*happen*' as being merely equivalent to '*happen to exist*' (as I think we may legitimately do), then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the Constitution is completely accomplished."

On the 19th of July, 1832 (2 Opin., 525), Attorney-General Taney concurred in the views above cited, and concluded as thus stated in the syllabus:

"The President has power, during recesses of the Senate, to fill all vacancies that may happen to exist in the subordinate offices of the Government, and is not limited in its exercise to those which occur during recesses."

It was the intention of the Constitution that the offices created by law, and which are necessary to the current operations of the Government, should always be full; and that, when vacancies happen, they shall not be protracted beyond the time necessary for the President to fill them. I also refer to Opinions of Attorney-General Legare, October 27, 1841 (3 Opin., 673); Mason, August 13, 1846 (4 Opin., 522); Bates, October 18, 1862 (10 Opin., 357); Stanberry, August 30, 1866 (12 Opin., 32).

The question is exhaustively discussed in the opinions cited, and without reiterating the reasons assigned, I concur in the conclusion reached, and answer your inquiry in the affirmative.

Vacancy in Office.

You also suggest the question whether, when a new office had been created by act of Congress, and existed during the session of the Senate, which had not been filled before the close of the session, you have power during a recess to fill such office.

The word "vacancy" in the Constitution refers to offices, and signifies the condition where an office exists, of which there is no incumbent. It is used without limitation as to how the vacancy comes to exist. The vacancy may have occurred by death, resignation, removal, or any other cause, but, regardless of the cause or manner of the existence of the vacancy, the power is the same. In the case submitted the law has created the office. The office, therefore, exists. There is no incumbent. There is, therefore, a vacancy, and the case comes under the general power to fill vacancies. This conclusion is fully sustained by the opinion of Attorney-General Stanberry (12 Opin., 38) as follows:

"The true theory of the Constitution in this particular seems to me to be this: that as to the executive power, it is always to be in action, or in the capacity for action; and that to meet this necessity, there is a provision against a vacancy in the chief executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session they must assent to his nomination. If the Senate is not in session the President fills the vacancy alone. All that is to be looked to is that there is a vacancy, no matter when it first occurred, and there must be a power to fill it. If it should have been filled whilst the Senate was in session, but was not then filled, that omission is no excuse for longer delay, for the public exigency which requires the office may be as cogent, and more cogent, during the recess than during the session. *I repeat it, wherever there is a vacancy there is a power to fill it.* This power is in the President, with the assent of the Senate whilst that body is in session, and in the President alone when the Senate is not in session. There is no reason upon which the power to fill a vacancy can be limited by the state of things when it first occurred. On the contrary, the only inquiry is as to the state of things when it was filled."

In reaching the above conclusions, I have not been forget-

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ful that the word "happen" in the Constitution suggests casualty or absence of premeditation; but it is incompatible with the character of the high office with which the votes of an intelligent people have entrusted the President, to presume that a power so necessary to the public welfare will be used needlessly, when time and opportunity are afforded for intelligent and judicious action during the session of the Senate.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

ACCOUNTS FOR ARMY TRANSPORTATION.

The payment of accounts of land-grant railroads (*i. e.*, such as have not received aid in Government bonds) for Army transportation, under the appropriation act of September 22, 1888, chapter 1027, is not controlled by the *proviso* in the acts of June 30, 1882, chapter 254, and August 5, 1882, chapter 390, but is governed by the provisions of the act of 1888 alone; and under these provisions such accounts can be lawfully paid by a quartermaster without previous action thereon by the accounting officers of the Treasury.

DEPARTMENT OF JUSTICE,

March 27, 1889.

SIR: By a letter dated the 26th ultimo the Secretary of War presented for the consideration of the Attorney-General the question whether accounts for Army transportation over certain land grant railroads (*viz*, such as have not received aid in Government bonds) can be lawfully paid by a quartermaster before adjustment thereof by the accounting officers of the Treasury.

This question is understood to refer to the payment of such accounts from the appropriation for the Army made by the act of September 22, 1888, chapter 1027, under the following provision therein: "For the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts); but in no case shall more than fifty per centum of the full amount of the service be paid: *Provided*, That such compensation shall be computed upon the

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basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full of all demands for such service."

In the provisions for the payment of such transportation contained in previous appropriation acts (see act of March 3, 1879, 20 Stat., 390; act of February 24, 1881, 21 Stat., 348; acts of June 30, 1882, August 5, 1882, and March 3, 1883, 22 Stat., 120, 261, 458; acts of July 5, 1884, and March 3, 1885, 23 Stat., 111, 360; acts of June 30, 1886, and February 9, 1887, 24 Stat., 97, 399), accounts therefor are required "to be adjusted *by the accounting officers* in accordance with the decisions of the Supreme Court," etc.; and the practice thereunder has been to refer these accounts to the accounting officers of the Treasury for adjustment preliminary to payment—the payment thereof being ultimately made, not through the agency of a disbursing officer of the quartermaster's department, as in ordinary cases, but directly from the Treasury by means of warrants issued upon requisitions of the Secretary of War for the balances certified by the accounting officers to be due.

But the provision in the act of 1888, quoted above, differs from those provisions in this, that it omits the words "by the accounting officers" in the clause relating to the adjustment of such accounts, which omission is regarded by the Quartermaster-General (at whose suggestion the above question was proposed) as indicating an intention on the part of Congress to permit accounts to be paid under that provision by disbursing officers of the quartermaster's department as other accounts of that department are ordinarily paid.

Formerly accounts of land-grant railroads were paid by these officers at the rates charged the public for similar services, subject to a deduction of 33 $\frac{1}{3}$ per centum, agreeably to a regulation of the War Department. But by the Army appropriation act of March 3, 1875 (18 Stat., 453-454), it was declared that no money should thereafter be paid for the transportation of property or troops of the United States over any railroad which in whole or in part was constructed by the aid of a grant of public land on the condition that such railroad should be a public highway for the use of the Government, free from toll or other charge; but that nothing

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therein contained should be construed as preventing any such railroad from bringing a suit in the Court of Claims for the charges for such transportation and recovering for the same, if found entitled thereto by virtue of the laws in force prior to the passage of that act, and to either party to the suit a right of appeal to the Supreme Court was given.

Subsequently suits were brought in the Court of Claims by certain railroad companies owning land-grant roads to recover compensation from the Government for transportation performed for it over such roads. These suits were carried to the Supreme Court on appeal, and it was there held that the railroad companies were entitled to compensation "for all transportation performed by them respectively of troops and property of the Government (excepting the mails) subject to a fair deduction for the use of their respective railroads." (See 93 U. S. Rep., 442.)

Afterwards Congress, by the act of March 3, 1879, cited above, made an appropriation for the payment of arrears of Army transportation due land-grant railroads, to be adjusted by the proper accounting officers in accordance with the decision of the Supreme Court, but in no event was more than 50 per cent. of the full amount allowed by the Quartermaster-General to be paid until a decision of the Court of Claims was had in each case.

This provision plainly contemplated that, before making any payment on a land-grant railroad account for arrears for Army transportation, the account should be adjusted by the accounting officers of the Treasury, and the practice thereunder accorded with this view. In thus providing that such account should be adjusted by those officers prior to its payment, instead of letting it take the usual course, *i. e.*, of being settled and paid by a quartermaster without previous action thereon by them, Congress doubtless regarded it more in the light of a claim than an ordinary transportation account—as a claim which required, for the proper adjustment thereof, not only a computation of the value of the services according to the tariff rates applicable thereto, but a determination of what is a fair deduction for the use of the road (to which the Government was entitled free of cost), and deemed it expedient to commit such determination to the accounting officers.

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The other acts hereinbefore cited, which were subsequently passed, down to and including the act of February 9, 1887, made similar provisions for the adjustment and payment of accounts of land-grant railroads for army transportation. Two of these acts, viz, acts of June 30, 1882, and August 5, 1882, contain the following *proviso*: "That any such land-grant roads as shall file with the Secretary of the Treasury their written acceptance of this provision shall hereafter be paid for like services *as herein provided*," etc. By this *proviso* the mode prescribed in the two acts referred to for the payment of such accounts (which necessitated the adjustment of the accounts by the accounting officers previous to payment) was extended to future claims for like services where the required written acceptance on the part of the roads is filed with the Secretary of the Treasury.

Recurring to the provision in the act of September 22, 1888, the inquiry now arises, whether the mode prescribed as above must be followed in the adjustment and payment of accounts of land-grant roads thereunder, as a legal requirement. From an examination of that provision in connection with the *proviso* last above mentioned I think this inquiry should be answered in the negative, and for the following reasons:

Consistently with the terms of the provision, an adjustment and payment of such accounts by the disbursing officers of the Quartermaster's Department, as other transportation accounts of that Department are usually paid, would seem to be admissible, subject to the restrictions contained in the provision itself, namely, that the compensation is computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, that not more than 50 per centum of the amount so ascertained is paid, and that this is accepted as in full of all demands for the services.

The accounts are to be adjusted in accordance with the decisions of the Supreme Court. But this is not by the provision required to be done, as theretofore, by the accounting officers. "The fair deduction for the use" of the roads, called for by the decision of that court already adverted to, having become in practice, as I am informed, uniformly fixed at

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a deduction of 50 per centum from the value of the services performed, when computed at the rates paid by the public at large for like services, the circumstance which formerly made it expedient to have the accounts adjusted by the accounting officers of the Treasury previous to payment, viz the determination in each case of what is a "fair deduction for the use" of the road, no longer exists, and it was probably in consideration of this that the words "by the accounting officers" were, in this provision, omitted in the clause relating to the adjustment of the accounts.

Furthermore, the compensation for Army transportation, computed upon the basis of the rates described in the provision in the act of 1888, may be paid thereunder to the extent of 50 per centum of the amount thus ascertained, if this is accepted as in full of all demands for such service, although no written acceptance of the provision in the acts of June 30, and August 5, 1882, as required by the *proviso* in those acts, quoted above, may have been filed with the Secretary of the Treasury. To bring an account within the operation of that *proviso* as to payment the filing of such written acceptance with the Secretary is essential; whereas, under the provision in the act of 1888, an acceptance "in full for all demands," etc., would be sufficient to authorize a payment if expressed in a receipt given therefor to a disbursing officer of the Army.

Upon the whole, I reach the conclusion that the payment of accounts of land-grant roads for Army transportation, under the act of September 22, 1888, is not controlled by the *proviso* referred to, but is governed by the provisions of that act alone, and I am of the opinion that, under its provisions, such accounts can be lawfully paid by a quartermaster without previous action thereon by the accounting officers of the Treasury.

I am, sir, very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

Site for Public Building at Buffalo, N. Y.

SITE FOR PUBLIC BUILDING AT BUFFALO, N. Y.

Upon the facts submitted, which are stated in the opinion : *Advised*, that the proposal made by Messrs. Mooney & Ferguson, dated February 17, 1889, to sell to the United States a site for a public building, at Buffalo, N.Y., and the response of the Secretary of the Treasury thereto, dated March 1, 1889, do not constitute a contract obligatory upon the United States.

The Secretary can not by contract bind the Government to exercise its power of eminent domain, to enable persons to sell to the Government land which they do not own.

DEPARTMENT OF JUSTICE,

March 27, 1889.

SIR: You orally requested my opinion as to whether a proposal made by Messrs. Mooney & Ferguson, dated the 17th day of February, 1889, to sell to the United States a site for a public building at Buffalo, N. Y., and the reply of the Secretary of the Treasury of the Treasury thereto, constitute a contract obligatory on the United States.

The first section of the act of the 5th of April, 1888 (Stat. of 1887 and 1888, p. 81), authorizes the Secretary of the Treasury "to purchase or acquire by condemnation a site in the city of Buffalo" for a public building, with a proviso that the sum to be paid therefor shall not exceed "two hundred and fifty thousand dollars."

The second section provides "that no part of this sum shall be expended until a valid title to said site shall be vested in the United States, and the State of New York shall have ceded to the United States exclusive jurisdiction over the same."

Messrs. Mooney & Ferguson proposed to the Secretary of the Treasury as follows:

"We do hereby make formal proposal to sell to the United States for the sum of \$250,000 the following property, to wit:"

(Here follows a description of the property.) It then proceeds :

"It is expressly understood and agreed, in case of acceptance of the proposal, that in the event a good and valid title to the above land, or any part thereof, can not be secured by grant, then the United States shall institute proceedings

Site for Public Building at Buffalo, N. Y.

in condemnation against such part thereof, in order that a valid title may be secured, binding ourselves to pay all expenses incurred in the procurement of the same, and that the land embraced in the above proposal shall not cost the Government more than \$250,000. * * *

"P. S.—See inclosed map."

The proposal, with the accompanying map and papers, shows that Mooney & Ferguson did not own any of the land included in the proposal, and the title appears therefrom to be in eight different ownerships, one of which is the city of Buffalo. It does not appear they had any contract with the owners to purchase, nor any power from them to sell.

On the 1st of March, 1889, the Secretary of the Treasury acknowledged receipt of the proposal, and replied:

"I have to advise you that the Department has determined to purchase the premises embraced in your proposal, upon condition that you will give a good and valid title to the same within a reasonable time, in accordance with the terms of your proposal.

"The honorable Attorney-General has this day been requested to instruct the United States attorney for the northern district of New York to procure the necessary evidence of title and deeds of conveyance to the United States, and to institute proceedings in condemnation in the event that a valid title can not be secured, and upon receipt of these papers at this Department, approved by the Attorney-General, as required by law, the payment of the purchase money will be promptly made."

The elements of the proposal of Mooney & Furguson, considered in detail, are:

(1) That they will sell to the United States lands of others, which they do not own, and over which they have no power

(2) That in order to enable them to procure title in case they can not obtain it by grant from the owners, the United States will acquire it by proceedings for condemnation.

(3) That if, after the title shall have been acquired, the whole expenses of the proceedings, and the consideration paid shall be less than \$250,000, the balance of that amount shall be paid to them. If they exceed that amount, Mooney & Furguson will make up the difference.

Site for Public Building at Buffalo, N. Y.

If this proposal accepted be considered as a contract of indemnity, it was not within the power of the Secretary of the Treasury as agent of the United States to make it, for he is only authorized to purchase land or acquire land by condemnation. Neither has he power to use proceedings to condemn for the benefit of any private parties. He could only condemn lands for public use. He could not by contract obligate the Government to exercise the power of eminent domain to enable a person to sell to the Government lands which he did not own, but which belonged to others. Neither could Mooney & Ferguson lawfully contract to sell specific lands belonging to other people, by a contract calling for immediate conveyance and delivery of possession, without power from or consultation with the owners. Such a transaction would be a wrong to the owners of the property and could not be sustained in law. One person can not rightfully sell another's house over his head without his authority.

This transaction in another aspect is also objectionable. The act of the 5th of April, 1888, above cited, forbids the payment of any part of the contract price until exclusive jurisdiction over the site shall have been ceded to the United States. This can be done only by the legislative power of the State of New York. No provision is made in either the proposal or the acceptance to provide for a compliance with this condition, nor for any delay of payment of the money until it shall have been done. The acceptance states that "upon receipt of these papers (the title papers) at this Department, approved by the Attorney-General, as required by law, the payment of the purchase money will be promptly made."

Upon all the facts shown by the papers submitted, I am of opinion that the proposal and acceptance do not constitute a contract obligatory upon the United States, and this being so, there is, of course, no liability on the part of any one for a failure to consummate the same.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Customs Laws.

CUSTOMS LAWS.

Classification under the act of March 3, 1883, chap. 121, of Chinese shoes composed of felt, leather, and cotton, and also Chinese shoes in which silk is the component material of chief value, considered.

DEPARTMENT OF JUSTICE,

April 3, 1889.

SIR: By your letter of the 30th of March, 1889, you inquire, referring to the case of *Swayne v. Hager*, "Whether the decision of the court should be acquiesced in, in so far as it holds that such merchandise is liable to duty at the rates to which the component materials thereof of chief value are liable, instead of as manufactures of hair."

Imports in the tariff acts may be "non-enumerated," "generally enumerated," or "specially enumerated;" each phrase marks a different degree of precision in the description of the imports.

When described as a species, they are "specially enumerated," and such enumeration when made determines the classification.

When described as a genus, or in general terms, they are merely enumerated, and, in the absence of a specific enumeration, such general enumeration determines the classification. One such general enumeration may also be more specific than another.

When not described either "specifically" or "generally," they are "non-enumerated."

Only "non-enumerated" imports are subject to classification under section 2499, Revised Statutes. Part of the Chinese shoes involved in the case of *Swayne v. Hager* were composed of felt, leather, and cotton. Such felt is manufactured partly of the hair of the goat or other animals. The plaintiff claimed the article was "non-enumerated," and that as such it should have been classified under the seventh clause of the cotton schedule, which provides for "all manufactures of cotton not specially enumerated or provided for in this act," by virtue of the provisions of section 2499. That clause applies only to articles composed exclusively of cotton, and hence of itself, independently of section 2499, does not sustain the classification claimed by the plaintiff.

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Section 2499 does not apply to the import in this case, for it is enumerated in the twelfth clause of schedule K, which provides generally for "all goods * * * and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca, goat, or *other animals* * * * not specially enumerated or provided for."

This is a general enumeration, and if the shoes which are composed partly of cotton are also composed partly of hair, in such an amount as to be a substantial element in the value of the import, they should be so classified, and, in that event, the result reached in the case I believe to be erroneous.

The conclusion of the court that the import should not be classified under the clause relating to ready-made clothing and wearing apparel, I concur in; but in a suit against a collector, if a plaintiff has made his claim, under a clause that is inapplicable to the case, an erroneous classification by the collector, under a clause equally inapplicable, can not be taken advantage of.

As to the shoes in which silk was the component material of chief value, the fourth clause of schedule L, which is, "All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem," is a more specific and general enumeration than the twelfth clause of schedule K, in that the proportionate amount in value of the material of which a composite article is made up constitutes an element to be considered in the classification, which is not found in the clause of schedule K above quoted. As to such shoes, I am of opinion that the classification claimed by the plaintiff is right.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CAVEATS FOR PATENTS FOR INVENTIONS.

By section 4902, Revised Statutes, the privilege of filing caveats in the Patent Office preliminary to applications for patents is limited to citizens of the United States, and aliens who have resided therein one year and declared their intention to become citizens.

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The second article of the convention entered into between the United States and certain other nations, proclaimed by the President on June 7, 1887, is not self-executing; and Congress having passed no law for its execution, it can not be deemed to extend the privilege granted by said section 4902 to all subjects and citizens of the nations parties to said convention.

DEPARTMENT OF JUSTICE,

April 5, 1889.

SIR: Your predecessor by his letter of the 15th of January, 1889, requested the opinion of the Attorney-General on the following state of facts:

Section 4902 of the Revised Statutes grants the right to file caveats preliminary to applications for patents for inventions and establishes the legal effect that shall be given to them. It also provides:

*"Any citizen of the United States who makes any new invention or discovery, and desires further time to mature the same, may * * * file in the Patent Office a caveat."*

It further provides:

"An alien shall have the privilege herein granted if he has resided in the United States one year next preceding the filing of his caveat, and has made oath of his intention to become a citizen."

By the first of these clauses the grant of the right is limited to citizens. By the second it is enlarged to include one class of aliens. The grant as a whole entitles only citizens and aliens who have been residents one year and have legally declared their intention to become citizens to file caveats.

It is claimed by Ferdinand Bourquin, a Swiss citizen, that the second article of a convention entered into between the United States and certain other nations, of which the Swiss Confederation was one, proclaimed on the 7th day of June, 1887 (U. S. Statutes of 1887 and 1888, treaties, 37), extends the grant of section 4902, Revised Statutes, to all subjects and citizens of the parties to the convention. That article provides:

"The subjects or citizens of each of the contracting States shall enjoy, in all the other States of the Union, so far as concerns patents for inventions, trade or commercial marks, and the commercial name, the advantages that the respective laws thereof at present accord, or shall afterwards accord, to sub-

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jects or citizens. In consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each State."

Congress has passed no law for the execution of this article, nor did the House of Representatives in any way consider or assent to the treaty.

Section 4902 is a part of the system of laws of the United States *concerning* patents for inventions. If, therefore, the article above quoted has become and is self-executing as an infraterritorial law, by virtue of the making and proclamation of the treaty by the President, by and with the advice and consent of the Senate, the claim made by Ferdinand Bourquin is valid.

By the second clause of the second section of the second article of the Constitution, the power to make treaties, by and with the advice and consent of the Senate, is vested in the President.

By the second clause of the sixth article of the Constitution "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

By the eighth clause of the eighth section of the first article, the whole legislative power over the subject of patents is committed to Congress. It is found among the powers to borrow money; to declare war; to raise and support armies; to constitute judicial tribunals; to regulate commerce, etc. It is due to the credit of the United States that the provisions concerning the treaty-making power of the President and the legislative power of Congress shall, if possible, be so construed and executed as to give full and proper effect to each, and insure harmony in their exercise.

In the case of *Foster v. Neilson* (2 Peters, 314), Chief-Justice Marshall delivering the opinion of the court, in discussing the effect of the Constitution on treaties as laws, declared:

"A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument.

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"In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. *But when the terms of the stipulation import a contract, when either of the parties engaged to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.*"

The principle thus stated has been generally accepted as a true interpretation of the constitutional provisions relating to the subject of treaties. It establishes that there is a class of treaties which, without legislation, does not become self-executing as a rule of municipal law. A statement is given of such provisions of treaties as come within this class; as when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act. But the decision does not enumerate or define the limitations of the whole class. In the treaty-making power conferred on the President the implication exists that the power is to be exercised by him, subject to the limitation of the Constitution. If, in time of peace, he should provide by the stipulations of a treaty for the quartering of soldiers in any house without the consent of the owner, such a stipulation would be simply void, because forbidden by the Constitution to every department of the Government. But where the Government of the United States has power under the Constitution over a subject, although that power may be vested by the Constitution exclusively in Congress, it has been claimed that in the making of treaties such power may be exercised by the President, by and with the advice and consent of the Senate, without the coöperation of the House of Representatives or act of Congress. Issue was joined on this proposition in 1796, between the President and Senate in the affirmative and the House of Representatives in the negative, concerning certain provisions of the Jay treaty with Great Britain. The treaty at the end of the disagreement remained intact, but the House of Representatives "passed resolutions disclaiming the power to interfere in making treaties, but asserting their right, whenever stipulations

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were made on subjects committed to Congress by the Constitution, to deliberate on the expediency of carrying them into effect; and in legislating on several treaties then before them they struck out the words 'that provision ought to be made by law' and substituted words which declared merely the expediency of passing the necessary laws." (Sargeant's Constitutional Law, 411; Story on the Constitution, section 1841.)

In the session of 1815 and 1816 a like disagreement arose concerning a commercial treaty made in the July preceding between the United States and Great Britain, by which it was agreed to abolish the discriminating duties on British vessels and cargoes. This disagreement was terminated with no decisive results.

The treaty between the United States and the King of the Hawaiian Islands, signed January 30, 1875, which provided for commercial reciprocity between the nations, and involved the exercise of one of the powers submitted to Congress by the Constitution, provided in its fifth article that it should not be ratified "until a law to carry it into operation should be passed by the Congress of the United States of America." (19 Stat., 627.) In execution of this treaty Congress, on the 15th of August, 1876 (19 Stat., 200), passed an act in accordance with the provisions of the treaty. The treaty by its terms, however, was clearly a contract, by which, in consideration of certain special commercial privileges granted on the one part, certain other like privileges were granted on the other. Such special privileges granted in consideration of others received the Supreme Court of the United States, in the case of *Bartram v. Robertson* (122 U. S. R., 120), ruled constitute a contract. Field, J., delivering the opinion (speaking of the treaty with Denmark as compared with that of the Hawaiian Islands), declared: "Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of two contracting parties, the United States and the King of Denmark, to each other, that, in the imposition of duties on goods imported into one of the countries which were the product or manufacture of the other, there should be no discrimination

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against them in favor of goods of like character imported from any other country. They imposed an obligation on both countries to avoid hostile legislation in that respect. But they were not intended to interfere with *special arrangements with other countries founded upon a concession of special privileges.*" (See also *Whitney v. Robertson* 124 U. S. 192.)

If the treaty-making power, in all treaties whose execution require the exercise of powers committed to Congress, should uniformly provide in the treaties for their proper submission to Congress before they should be effective, consequences might be avoided which may jeopardize the credit of the nation. Under the British constitution, with reference to this subject, the jurisdiction of Parliament is thus stated in 1 Todd's Parliamentary Government in England, page 610:

"The constitutional power appertaining to Parliament in respect to treaties is limited. It does not require their formal sanction or ratification by Parliament as a condition to their validity. The proper jurisdiction of Parliament in such matters may be thus defined: First: It is right to give or withhold its sanction to those parts of a treaty that require a legislative enactment to give it force and effect; as, for example, when it provides for an alteration in the criminal or municipal law, or proposes to change existing tariffs or commercial regulations. * * * If a treaty requires legislative action in order to carry it out, it should be subjected to the fullest discussion in Parliament, and especially in the House of Commons, with a view to enable the Government to promote effectually the important interests at stake in their proposed alterations in the foreign policy of the nation."

It is not necessary to the decision of the question submitted to me in the matter under consideration to determine whether all the provisions of treaties, whose execution requires the exercise of powers submitted to Congress, must be so submitted before they become law to the courts and Executive Departments, for the treaty under consideration is a reciprocal one; each party to it covenants to grant in the future to the subjects and citizens of the other parties certain special rights in consideration of the granting of like special rights to its subjects or citizens. It is a contract operative

Purchase of United States Bonds.

in the future infraterritorially. It is therefore not self-executing, but requires legislation to render it effective for the modification of existing laws.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

PURCHASE OF UNITED STATES BONDS.

The power given the Secretary of the Treasury by section 2 of the act of March 3, 1881, chapter 133, to purchase United States bonds with the surplus money in the Treasury not otherwise appropriated, does not include the payment of commissions to private parties to purchase for the Government.

Only the market price of the bond at the time of the purchase should be paid; no commissions in addition to the par value of the bond and the premium thereon can be lawfully paid.

DEPARTMENT OF JUSTICE,

April 10, 1889.

SIR: By your letter of the 30th of March, 1889, you ask, "Whether, under existing law, the Secretary is limited to the market price in purchasing United States bonds with the surplus or for the sinking fund, and particularly whether, if he may lawfully pay more than the market price, there would be any distinction between an additional premium paid to the owners of the bonds purchased and a commission paid to such holders or other persons."

The last clause of section 1 of the act of the 11th of July, 1862, (12 Stat., 532) provides that the Secretary of the Treasury "may purchase, at rates not exceeding that of the current market, and cost of purchase not exceeding one-eighth of one per centum, any bonds or certificates of debt of the United States as he may deem advisable."

Section 5596, Revised Statutes, declares: "All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, *any portion of which* is embraced in any section of the said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts or not being general and permanent in their nature."

A portion of sections 1 and 2 of the act of July 11, 1862,

Purchase of United States Bonds.

above quoted, is embraced in and supplied by sections 3579 and 3577 of the Revised Statutes. The clause of that act above cited, which is referred to in your letter, is therefore repealed by the revision of the statutes.

The second section of the act of the 3d of March, 1881 (21 Stat., 457), provides :

"That the Secretary of the Treasury may at any time apply the surplus money in the Treasury not otherwise appropriated, or so much thereof as he may consider proper, to the purchase or redemption of United States bonds: *Provided*, That the bonds so purchased or redeemed shall constitute no part of the sinking fund, but shall be canceled."

The only express limitation to the exercise of the power to purchase conferred by this section is that the amount to be applied in the purchase or redemption of the bonds shall not at any time or in any event exceed the surplus in the Treasury not otherwise appropriated. Within this maximum amount it confers on the Secretary an official discretion to purchase or redeem from time to time whatever amounts may to him seem to be for the best interests of the United States. The legislature, no doubt, intended, in conferring this discretion, to prevent loss to the Government by combinations which might be made to raise the price of bonds, if the Secretary had been required at any given time to purchase any fixed amount. It was not intended that forced purchase on an artificial, inflated market should be made. It is also intended that the Secretary shall be free to make purchases when the market price is depressed. This discretion was intended to be exercised with the same watchfulness for the interests of the Government that a prudent private dealer would exercise for the protection of his own interest, with this difference, that the Government should act upon a somewhat broader view with reference to the effect of the purchase upon the general business of the whole country. The intent of the law is that the exercise of the discretion should generally be dependent upon the state of the market as a chief element. Keeping this in view, the discretion was not intended to be so rigorously limited as to prevent purchases, even though the market price, by reason of such purchases or other natural causes, might rise, or even in special emergencies, when a general financial crisis could be

Payments of Judgments of Court of Claims.

avoided or stayed by a moderate advance above the then market values. But the policy of the Government, generally applicable in its purchases, is to buy in a free and open market, where all sellers of the commodity can readily compete and where the Government can have the benefit of such competition. This policy should be recognized in the exercise of the power.

The power conferred by the statute does not extend to the making of contracts for future delivery, but is limited to actual cash purchases. The purchases are to be made by the Secretary. He is to do this directly, through the proper officers of the Government, and is not authorized by law to pay any commissions to private parties to purchase for the Government. He is only authorized to apply the surplus money to the purchase of bonds, and not to the payment of salaries or commissions.

There is a distinction between the payment of premiums above the par value of the bonds to the owner and a commission to a third party who is not the owner. The premium is a part of the actual consideration paid for the bond to the owner thereof or his agent. A commission for his own use, paid by the Government to one who is not the owner, is an application of the money intended for the purchase of the bonds to a purpose for which the law has not appropriated it.

I therefore answer your inquiry that, except when special and emergent general financial necessities demand relief, it is the intention of the law that only the market price at the time of purchase should be paid, and that no commissions in addition to the par value of the bond and the premium thereon can be lawfully paid.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

PAYMENT OF JUDGMENTS OF COURT OF CLAIMS.

Where a judgment against the United States was recovered in the Court of Claims, and a stipulation was made, which is of record in the case, to the effect that neither the plaintiff nor the defendant would take an appeal from such judgment: *Advised that there is no legal objection to payment of the judgment before the expiration of the ninety days allowed by statute for taking an appeal.*

Payment of Judgments of Court of Claims.

DEPARTMENT OF JUSTICE,

April 11, 1889.

SIR: I have the honor to acknowledge the receipt of yours of the 16th ultimo, in relation to the payment of the judgment of the Court of Claims in favor of Patrick J. Kennedy for the sum of \$26,379 before the expiration of the ninety days allowed by statute in which an appeal may be taken to the Supreme Court.

I find among the papers transmitted by you (1) a copy of the communication from the War Department in which the claim originated, addressed to the Attorney-General, dated the 19th of February, 1889, in which it is suggested in effect that no further action is desired by that Department; (2) a certificate from the Assistant Attorney-General who has charge of the business in the Court of Claims stating that no appeal will be taken on behalf of the United States; (3) a solemn stipulation in duplicate dated March 12, 1889, signed by the claimant in person, and by the said Assistant Attorney-General, to the effect that neither the plaintiff nor the defendant will appeal from the said judgment of the Court of Claims. A copy of this stipulation is of record in the case in the Court of Claims. These are the facts in the case as now presented.

Upon these facts you request advice as to "whether the right of appeal has expired in this case," within the purpose of the proviso to section 1 of "An act making appropriations to supply deficiencies," etc., approved March 2, 1889.

The proviso, although in absolute terms, was for the protection of the defendant Government. The Government, having first demanded of the claimant that he would release and waive all right of appeal, has consented that she would execute a waiver which is of record.

I, therefore, give an opinion in accordance with your request, that there is no legal objection to the payment of this judgment or judgments which stand in similar attitude. The question remains of administration, and is so referred to the Secretary of the Treasury.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Case of Major W. F. Smith.

CASE OF MAJOR W. F. SMITH.

Under the act of February 14, 1889, chapter 166, S. was appointed from civil life to the position of major of engineers in the Army, and thereupon was placed on the retired list of the Army as of that grade: *Advised*, that he must take the oath required by section 1756, Revised Statutes, and that this act would be in law a legal acceptance of the office and, as such, a sufficient formal acceptance.

The provisions of sections 1259, 1763, 1764, and 1765, Revised Statutes, do not require the annulment of the appointment held by S. as agent in charge of river and harbor work at Wilmington, Del., and that he be relieved from that work.

A retired officer of the Army is not ineligible to hold an appointment to a civil office.

DEPARTMENT OF JUSTICE,
April 13, 1889.

SIR: By your letter* of the 1st of April, 1889, you ask:

“(1) Before entering upon the enjoyment of the office of major upon the retired list, United States Army, is it a legal prerequisite that Major Smith should formally accept said office?

“(2) Do the provisions above referred to require that the appointment of Major Smith to the charge of the river and harbor work at Wilmington, Del., be canceled, and that he be relieved from such work?

“(3) Do the provisions of the said section render Major Smith, as a retired officer of the Army, ineligible to receive a civil appointment at a fixed rate of compensation, to take charge of work in connection with the improvement of rivers and harbors?”

Section 1094, Revised Statutes, includes “the officers of the Army on the retired list” in the Army of the United States. They are therefore officers of the United States.

* In the letter above referred to the Secretary of War states “that Mr. W. F. Smith, who by civil appointment has been employed as a United States agent in charge of river and harbor work at Wilmington, Del., at an annual compensation of \$3,000, was on March 1, ultimo, commissioned major United States Army, and placed upon the retired list as of that rank on that date;” and in view of these facts the Secretary calls attention to sections 1259, 1763, 1764, and 1765, Revised Statutes, and propounds the questions set forth in the Attorney-General’s opinion.

Case of Major W. F. Smith.

Sections 1756 and 1757, Revised Statutes, require "every person elected or appointed to any office of honor or profit, either in the civil, military, or naval service, * * * before entering upon the duties of such office, and before being entitled to any part of the salary or other emoluments thereof," to take and subscribe a prescribed oath, before entering upon the enjoyment of the office to which he has been appointed.

Mr. Smith, of whom you write, must take the oath required. This qualification imposes upon him full official obligation and is in law a legal acceptance of the office, and, as such, a sufficient formal acceptance.

The last two questions submitted have substantially been passed upon by the Senate, by this Department, and by the courts before.

On the 14th of April, 1882, the following resolution was submitted to the Senate of the United States:

"*Resolved*, That the Committee on the Judiciary be instructed to inquire, and report by bill or otherwise, whether or not a retired United States Army officer can lawfully hold a civil office under the Government of the United States."

It was referred to the Committee on the Judiciary, which, on the 18th, through Mr. Garland, reported to the Senate, "answering the question in the affirmative."

On the 7th of June, 1851, a similar question was submitted to Attorney-General Crittenden under the statutes of the 3d of March, 1839 (5 Stat., 334-349), and of the 23d of August, 1842 (5 Stat., 508-510), from which section 1765, Revised Statutes, was derived. He replied (5 Opin., 768):

"The plain meaning of this seems to be that an individual holding *one* office and receiving its salary shall, in no case, be allowed to receive also the salary of *another office*, which he does not hold, simply on account of his having performed the duties thereof. The prohibition is against his receiving the salary of an office that he does *not hold*, and not against his receiving the salaries of two offices which he *does legitimately hold*."

On the 11th of June, 1877, like questions were submitted to Attorney-General Devens. In his reply (15 Opin., 306) he considers and interprets all the sections to which you

Case of Major W. F. Smith.

refer, and declares: "Sections 1763, 1764, and 1765, above referred to, are condensations from statutes which were in existence at the time that this decision (*Converse v. The United States*) was made, and in conformity with it I deem it my duty, in answer to your inquiry, to say that a retired officer may draw his pay as such, and may also draw the salary of any civil office which he may hold under the Government, assuming always that the duties of the civil office are performed under and by virtue of a commission appointing him to that office which he holds in addition to his rank as a retired officer."

This interpretation is sustained by the Court of Claims in *Meigs v. United States* (19 C. Cls. R., 497), and by the Supreme Court in *Converse v. United States* (21 How., 464), *United States v. Brindle* (10 U. S. R., 688), and *United States v. Saunders* (120 U. S. R., 126), in which last case Miller, J., delivering the opinion, declares:

"We are of opinion that, taking these sections (1763, 1764, and 1765) all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations."

I am of opinion that the above interpretation of sections 1259, 1763, 1764, and 1765, Revised Statutes, to which you refer, is well established alike by reason, precedent, and authority.

Zoological Park Commission.

I therefore answer your first inquiry in the affirmative, and your second and third inquiries in the negative.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

ZOOLOGICAL PARK COMMISSION.

Under section 4 of the act of March 2, 1889, chap. 370, the Commission thereby created have authority to defray out of the appropriation for establishing the Zoological Park all necessary expenses incidental to the selection and acquisition of the land for the park, but not to apply the appropriation to laying out the land, erecting buildings thereon, etc. The provisions of that section extend no further than the selection and acquisition of the land.

DEPARTMENT OF JUSTICE,

April 13, 1889.

SIR: In reply to your communication asking an opinion as to whether the Commission for the establishment of a zoological park has authority under section 4 of the act of 2d March, 1889, establishing the Commission, "to incur expenses, not only for purchasing, but for laying out the land, purchasing or erecting buildings, or accepting donations of land, buildings, or money, connected with the scientific or other purposes of the park, and to pay from the appropriation the necessary clerk hire and incidental expenditures of the Commission."

While the Commission thus established seems to be intended as a permanent institution to have charge of the Zoological Park provided for, it seems equally clear that it was the intention of Congress to confine the powers of the Commission, for the present, to making a selection of land for the park within the limits stated in the act, to having a map made of the park so selected in accordance with the directions of the act, to fixing the price to be paid for each parcel of ground, with the approval of the President of the United States, and to purchasing the same at such price or to instituting proceedings for the condemnation of the property

WASHINGTON AQUEDUCT TUNNEL.

of such owners as should not agree to the prices fixed as above stated.

To enable the Commission to perform the duties cast on them, I think they must be held to have authority by implication to employ clerks to assist them and to incur other necessary incidental expenses, and to defray such clerk hire and expenses out of the appropriation of \$200,000 for establishing the park; but I do not think the Commission have power to lay out the land, otherwise than by making "the careful map" directed by the act, or to purchase or erect buildings or to accept donations of land, buildings, or money. In my opinion Congress did not intend by this provision of law to go further than the selection and acquisition of the land for the contemplated park, reserving all other matters for future legislation.

I have the honor to be, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

WASHINGTON AQUEDUCT TUNNEL.

Provisions of the contract with Messrs. Beckwith & Quackenbush, entered into on October 29, 1883, for the construction of a tunnel to increase the water supply of Washington, D. C., and of the agreements supplementary thereto, considered with reference to certain inquiries propounded; and advised (1) that should Major Lydecker, or his successor, legally appointed, with the sanction of the Chief of Engineers, annul the contract, and give notice thereof to the contractors, the right of the latter to make good the defective work may legally be denied; but so long as the contracts remain in full force the contractors have the right, at their own expense, within a reasonable time, to make the defective work good; (2) should the contracts be annulled, as above, the contractors can not be legally compelled thereafter to make the defective work good, but they can be made liable for the actual necessary expenditure which the Government may incur in making it good; (3) that to meet such liability the Government may retain any money it now has, to which the contractors would have been entitled had the work been good; (4) the expenditure authorized by the resolution of October 19, 1883, includes expenses attending the inspection of the repairs necessary to protect and preserve the work already done, but not those attending the inspection of other work.

Washington Aqueduct Tunnel.

DEPARTMENT OF JUSTICE,

April 17, 1889.

SIR: Your letter of the 2d of April, 1889, with the accompanying papers, has been received and considered. You ask:

"(1) Can it legally be denied to the contractors to make good the defective work, and to cause it to conform to the specifications of the contract entered into with them?

"(2) If this denial can be made, then may the contractors be legally compelled to make such defective work good at some future time, or be made liable for the expense of the same?

"(3) If the contractors were to proceed with the repairs to the defective work, could the expenses attending the inspection of the repairs be paid out of moneys appropriated by the act of the 30th of March, 1888, for superintendence and engineering, having in view the terms of the joint resolution of October 19, 1888?"

The material facts on which the inquiries arise are that on the 29th day of October, 1883, Beckwith & Quackenbush entered into a contract with the United States to "furnish the material and do the work *for construction of tunnel* for increasing the water supply of Washington, D. C.," according to specifications and on terms and conditions prescribed in the contract. It is provided by the contract that the advertisements and specifications attached shall form part of it. The specifications require that "All work and workmanship must be the best of its kind, satisfactory in every respect to the United States engineer," * * * and that "failure on the part of the contractor to comply with any of the requirements contained in this paragraph will be authority for the United States to annul the contract, and proceed with the work in such manner as may be deemed necessary for its most speedy and economical completion, and to withhold from the contractor all retained percentages and other moneys that may be due or become due."

The contract also provides:

"If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, *or shall*

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in the judgment of the engineer in charge fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract, by giving notice in writing to that effect to the party or parties or either of them of the second part; and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the material be in his opinion required by the public exigency, to proceed to provide for the same by purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States."

The contract also stipulates that—

"If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties."

In pursuance of this last stipulation, "a change or modification in the project" having been determined upon, an agreement was entered into between the parties, supplemental to the first contract, with the express covenant that the provisions of the first contract should apply to the second so far as the party of the first part deemed them applicable. On the 5th of December, 1887, another change or modification was made in the first contract, as supplemented by the second, by virtue of which 85 per cent. of the 10 per cent. of each monthly payment which had been retained by the United States in accordance with the contract till the final "completion and acceptance of the work" was paid to the contractors, part of the consideration for the "work already done to the satisfaction of the party of the first part."

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This third contract expressly provides :

" It is understood and agreed that nothing herein contained shall be construed to release from or add to any obligation, *liability*, right, or duty devolving on either party under the operation of the two several articles of agreement to which the foregoing are supplemental."

On the 8th day of May, 1888, an additional change or modification was made in the original contract, as before supplemented, in which it was expressly provided :

" It is further understood and agreed that nothing herein contained shall be construed to release from or add to any obligation, *liability*, right, or duty, involved in the original contract of October 29, 1883, or any articles of agreement supplemental thereto, so far as concerns the parties in interest, except as specifically provided in these final supplemental articles."

There is nothing in any of the contracts, or the accompanying papers, which militates against or changes the covenant of the contractors in the first contract that " all work and workmanship must the best of its kind, satisfactory in every respect to the United States engineer." The original contract and all its supplements are to be construed together. Where their provisions are consistent, they all stand ; where inconsistent, the latest provision supersedes the earlier one.

The contractors, in their letter of the 9th of March, 1889, state : " We concede that there has been much bad work done in the lining of this tunnel by the subcontractors, who had entire charge of this lining. We deny that we knew of this bad work, and we are prepared to prove specifically two facts which conclusively show such want of knowledge."

That the bad work was done by subcontractors of Beckwith & Quackenbush, either with or without their knowledge, is entirely immaterial so far as the rights of the United States are concerned. The subcontractors were the agents or employés of the contractors alone, and if they were either incompetent, negligent, or dishonest, it was the duty of their employers to see to that, and take measures to prevent loss or wrong on any account by their agents. They could not, by a subcontract, to which the United States was not a party, relieve themselves from the obligation of their cove-

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nant, nor impute the effect of the carelessness or wrong-doing of their own agents to the United States. The payment which they in their communication allege they made after the 5th of December, 1887, to their subcontractors is urged by them as an estoppel against any claim for future liability for past bad work after the contract of the 5th of December, 1887. The contract furnishes a full reply to this, for it provides that nothing therein contained "shall be construed to release from * * * liability under former contracts." That contract, so far as material in the questions submitted, is inconsistent with the first contract only in that it released 85 per cent. of the fund retained to that date on the prior contracts which was to have been "retained until the final completion and acceptance of the work." Throughout all the supplements the provisions of the first contract, that "all work and workmanship must be the best of its kind, satisfactory in every respect to the United States engineer," and the consequences of a failure to perform as above set forth, remain in full force. The fact that the work was admittedly bad warrants the exercise of the power contained in the contract providing for its annulment. The contractors, by notice or otherwise, can not prevent the exercise of this power, if the proper officer of the United States determines in good faith that the exercise of it is necessary to subserve the best interests of the Government.

The contract provides, in case of an annulment, the United States may "proceed with the work in such manner as may be deemed necessary for its most speedy and economical completion, and to withhold from the contractor all retained percentages and other moneys that may be due or become due." In case this action on the part of the Government is taken, one of the first clauses of the contract provides:

"The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material."

A prior clause had provided that while the contractors were conducting the work they should furnish the material and do the work for the prices therein named. The last clause quoted was intended to define the responsibilities of the con-

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tractors when the Government did or relet the work after notice of annulment.

The act of the 30th of March, 1888 (Statutes of 1887 and 1888, page 51), requires that the work on the tunnel then provided for shall be completed on the 1st day of November, 1888, and by its terms contemplates that the work may be done either under existing contracts or by a reletting. The resolution of the 19th of October, 1888 (*id.*, 632), authorizes and directs the Secretary of War to expend so much of the unexpended balance of the appropriation in the last act as may be necessary for the purpose of protecting and preserving the work already done on the tunnel. The direction contained in this resolution for the protection and preservation only is a limitation of the use of the unexpended balance to those purposes. The implication arises that that balance can only be drawn upon for the purposes named. It follows that, so far as the repair of the defective work is necessary to protect and preserve the work already done, the Secretary of War has power to expend so much of the balance as may be necessary for the protection and preservation of the work. Such power would include the necessary expenditure for inspection of the repairs to insure good work and proper material. But if the repairing is done by the former contractors, they would be only doing over that which was badly done before, and they would not be entitled to any compensation for such repairs out of the appropriation. If such repairing should be done directly by the Secretary of War or by a reletting, the expense incurred for the material and work as well as the inspecting may be paid for out of the balance of the appropriation.

To your first inquiry I therefore answer, that if Major Lydecker, or his successor legally appointed, with the sanction of the Chief of Engineers, annul the contracts, and give notice thereof to the contractors, the right of the contractors to make good the defective work can be legally denied. But, so long as the contracts remain in full force, they have the right at their own expense, within a reasonable time, to make the defective work good.

To your second inquiry I answer, if the contracts be annulled as stated in my answer to your first inquiry, the con-

Marshal of Indian Territory.

tractors can not be legally compelled thereafter to make the defective work good, but they can be made liable for the actual necessary expenditure which the United States may incur in making it good. To meet such liability the United States may retain any money it now has, to which the contractors would have been entitled if the work had been good.

Your third inquiry I answer in the affirmative, so far as the inspection of such repairs may be necessary to protect and preserve the work already done. As to any work except such as may be necessary to protect and preserve the work already done, I answer in the negative.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

MARSHAL OF INDIAN TERRITORY.

The marshal appointed under the act of March 1, 1889, chapter 333, providing for the organization of a court in the Indian Territory, has the same powers in that Territory which a sheriff in Arkansas has in his own county; and his power to appoint deputies is limited only by the necessity of the case.

He may call to his assistance, in the execution of the law, civilians, but not the military forces of the United States, the use of the latter as a *posse comitatus* being forbidden by the act of June 18, 1878, chapter 263. It is competent to the President, under section 5298, Revised Statutes, to direct the military forces to render the marshal such aid as may be necessary to enable him to maintain the peace and enforce the laws of the United States in that Territory.

DEPARTMENT OF JUSTICE,

April 18, 1889.

SIR: I have the honor to submit that, by section 2 of the act of March 1, 1889, providing for the organization of a court in the Indian Territory, it is provided that the marshal, appointed under the provisions of that act, "shall discharge the like duties and receive the same fees and salary as now received by the marshal for the western district of Arkansas. The said marshal will appoint one or more deputies, who shall have the same powers and perform the like duties and

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be removable in like manner as other deputy United States marshals."

By section 6322 of the Revised Statutes of Arkansas it is provided:

"Each sheriff shall be a conservator of the peace in his county, and shall cause all offenders against the laws of this State, in his view or hearing, to enter into recognizance to keep the peace, and appear at the next term of the circuit court of the county; and on the failure of the offender to enter into recognizance to commit him to jail."

Section 6324:

"He shall quell and suppress all assaults and batteries, affrays, insurrections, and unlawful assemblies."

Section 6325:

"He shall apprehend and commit to jail all felons and other offenders."

Section 6370:

"The sheriff of any county shall not only have power to call to his assistance every man to aid him in discharge of his duty in the execution of the laws of this State, but shall be, and is hereby, authorized and empowered to make a requisition upon any officer commanding a regiment or battalion of militia or brigadier or major-general of militia within this State for such number of men as may be necessary to suppress all resistance to his authority in the execution of the laws of this State within any county."

Section 6375 authorizes the sheriff, having arrested any offender, unless such offender shall enter into recognizance, with two or more sufficient securities in at least double the highest sum fixed for the offense, to commit said offender to prison for safe-keeping, and he is authorized to put him in any prison in the State.

The marshal of this new Territory, therefore, seems by force of the act under which he was appointed to be endowed with very large authority as a peace officer, having the same powers in the Indian Territory as the sheriff of any county in Arkansas has in his own county. This is in accordance with the general policy of the Federal legislation on this subject.

Section 788 of the Revised Statutes of the United States reads: "The marshals and their deputies shall have in each State the same powers in executing the laws of the United

Marshal of Indian Territory.

States as the sheriffs and their deputies in such States may have by law in executing the laws thereof."

This section, 788, is cited not because it is supposed to apply to this particular case, as it clearly does not, being limited to States and this being a Territory, but as showing that the same policy is pursued with reference to the powers granted to the marshal in this Territory as is granted to the marshals in the States. Under section 788 the United States marshals in Arkansas would have all the powers of the sheriffs in that State.

Under section 2 of the act organizing the court in the Indian Territory, the marshal of the court has the same authority. This section is fortified by section 1976 of the Revised Statutes of the United States, which provides: "That the marshals of each Territory shall have the powers and perform the duties and be subject to the regulations and penalties imposed by law upon the marshals for the several judicial districts of the United States."

Section 2 provides that the marshal may appoint one or more deputies. In other words, his power to appoint deputies is not limited except by the necessity of the case, and he may call to his assistance, in the language of the statute of Arkansas, "every man to aid him in the discharge of his duty in the execution of the laws of this State."

Section 787 provides that the marshal shall have power to command all necessary assistance in the execution of his duty.

So far the statutes would have reference, I should think clearly, to calling upon civilians for aid; but the sheriffs in Arkansas are authorized to call upon the military forces, also, if necessary; and by parity of reasoning it would seem that the marshal in the Indian Territory, being a Federal officer, would in like manner be authorized by section 2 of the act organizing that court to call upon the military forces of the Government to aid him in maintaining peace and enforcing the laws, if necessary.

This would undoubtedly be so, but for the provisions of section 15 of the act of June 18, 1878, forbidding the use of the army as *posse comitatus* except as expressly authorized by the Constitution and laws.

United States Marine Hospital Service.

But notwithstanding this provision, certainly it is competent for the President, under Section 5298 of the Revised Statutes of the United States, to direct the military forces to render such aid to the marshal, upon his request, as may be necessary to enable him to maintain the peace and enforce the laws of the United States in that Territory.

Respectfully,

W. H. H. MILLER.

The PRESIDENT.

UNITED STATES MARINE HOSPITAL SERVICE.

The provision in section 2 of the act of January 4, 1889, chapter 19, that "no officer shall be promoted to the rank of passed assistant surgeon until after four years' service," applies to all assistant surgeons in the Marine Hospital Service without any exception.

DEPARTMENT OF JUSTICE,

April 24, 1889.

SIR: I have considered the petition of certain assistant surgeons of the United States Marine Hospital Service asking that the requirement of the second section of the act of January 4, 1889, entitled "An act to regulate appointments in the Marine Hospital Service of the United States," that no officer shall be promoted to the rank of passed assistant surgeon until after four years' service, shall be held not to extend to the petitioners.

The ground on which this application is made is that the petitioners, as they say, "came into the service under a regulation requiring but three years' service previous to examination for promotion, which regulation had the force of law, and the application of said clause of the new law would make it *ex post facto* and raise a doubt as to its legality."

I am of opinion that the proviso in question applies to the petitioners, and that it is not open to the objection urged against it, but that Congress had undoubtedly power to make the term of service necessary for the promotion of all assistant surgeons, including the petitioners, to the rank of passed assistant surgeon, four years instead of three.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Public Building Site at Springfield, Mo.

PUBLIC BUILDING SITE AT SPRINGFIELD, MO.

The act of March 29, 1888, chap. 45, entitled "An act for the erection of a public building at Springfield, Mo.," authorizes the Secretary of the Treasury to purchase "a site," and when this is done his authority in that regard is exhausted; he is not at liberty to buy another site in addition to the first.

As such authority is limited to a single site, so the authority derived thereunder to select and contract for the purchase of a site is likewise restricted.

Assuming that the contract to purchase a particular site, made with Messrs. Wooley, Porter & Hubbell, still exists, the Secretary is without authority to select a second site and contract for its purchase.

Should that contract become rescinded, or otherwise determined, without any actual sale taking place, the authority to select and contract for the purchase of another site would revive.

The obligation to pay for the property arises when a valid title thereto is conveyed and becomes vested in the United States; hence not until acceptance of the deeds tendered by the vendors.

DEPARTMENT OF JUSTICE,

April 29, 1889.

SIR: By your letter of the 23d instant, and the papers which accompanied the same, it appears that, under the provisions of the act of March 29, 1888, entitled "An act for the erection of a public building at Springfield, Mo.," the Treasury Department on the 1st of December, 1888, advertised for proposals for the sale to the Government of property suitable for a site for the building authorized to be erected by that act, such proposals to be received until 12 o'clock noon of December 15, 1888.

On January 10, 1889, in a letter addressed to Messrs. Wooley, Porter & Hubbell, Springfield, Mo., the Secretary of the Treasury accepted their proposal, bearing date December 15, 1888, for the sale of certain property located in that place for the sum of \$1, on condition that they give a good and valid title to the same within a reasonable time; adding: "The honorable the Attorney-General has this day been requested to instruct the United States attorney for the western district of Missouri to procure the necessary evidence of title and deeds of conveyance to the United States, and when these papers are received at this Department, with

Public Building Site at Springfield, Mo.

the approval of the Attorney-General, as required by law, the payment of the purchase money will be promptly made."

Subsequently the United States attorney for said district, pursuant to instructions given him by the Attorney-General in compliance with a request made by the Secretary of the Treasury under date of January 10, 1889, forwarded to this Department title papers relating to the property embraced in the said proposal of Messrs. Wooley, Porter & Hubbell, including certain deeds to the United States offered by them for the acceptance of the Government.

These papers were afterwards transmitted to the Secretary of the Treasury by the Attorney General with a letter dated the 23d ultimo, wherein the latter stated that in his opinion the deeds offered for acceptance, as above, are sufficient to convey a valid title to the whole of the premises, subject to such taxes as are assessed thereon and remain unpaid. It was assumed in that opinion that three unrecorded releases of certain deeds of trust were executed (as they were alleged to be) by the holders of the notes secured by such deeds of trust. But the Secretary was at the same time advised by the Attorney-General that before accepting a transfer of the property the United States attorney should ascertain whether the persons who executed such releases are the holders of such notes, and, if so, see that their releases are duly recorded, and furthermore that he should see that all unpaid taxes upon the property are discharged by the grantors of the premises, etc.

On the 26th ultimo the Secretary of the Treasury wrote to Messrs. Wooley, Porter & Hubbell, as follows:

"I have to advise you of the receipt from the Attorney-General of a letter of the 23d instant, transmitting abstract of title and other papers covering property situated on the southwest corner of St. Louis and Jefferson streets, having a frontage of 145 feet on the former and 100 feet on the latter street, selected as a site for the public building to be erected at Springfield, Mo. Before completion of the transfer to the Government of the property in question, in the opinion of the Attorney-General it will be necessary for the district attorney under whose charge the papers were prepared to obtain certain information and perform certain duties, which

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action he will be at once requested to take, and upon indication from him of a compliance with the requirements of the Attorney-General, a formal transfer of the property to the Government will be effected, and action taken looking to a compliance with the requirements of the act of Congress authorizing the erection of the building in question."

In connection with the foregoing you present for my consideration the following questions:

"First. When does the discretionary power of the Secretary of the Treasury in regard to the selection of property for a site for said building cease?

"Second. When does the obligation of the Department to make payment of the purchase money for said property become established? -

"Third. When does the title to said property become vested in the United States.

"Fourth. Has the opinion delivered by the Attorney-General May 6, 1861, been or should be modified."

By the act of March 29, 1888, cited above, the Secretary of the Treasury is "authorized and directed to purchase or otherwise provide a site" for the proposed building. Under this provision he undoubtedly derived authority to select and contract for the purchase of a site, subject to the restrictions imposed by the act as to cost, etc., and the correspondence with Messrs. Wooley, Porter & Hubbell disclose the fact that the site offered by them was selected and their proposal for the sale of the same accepted by the Secretary, on condition that within a reasonable time they give a valid title thereto bearing the approval of the Attorney-General. This condition being assented to by them, as shown by their acts, the contract to purchase the site so offered on such condition thus became complete.

The deeds with the evidence of title submitted by them have been found by the Attorney-General sufficient to pass a valid title to the site (assuming that certain releases were executed by competent parties, as claimed), subject to such taxes as may remain unpaid, the papers not showing that there were no unpaid taxes thereon.

Should it appear, on further investigation, that those releases are good, that there are no unpaid taxes on the prem-

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ises, that the same are free from other liens and incumbrances, and that nothing has occurred since the date of said deeds affecting the title of the grantors thereto, in such case the conditions imposed by the Secretary in his acceptance of the proposal of Messrs. Wooley, Porter & Hubbell would seem to be fully performed, and the agreement to purchase the site offered for sale by them to be obligatory. It may be that, as matter of fact, all the conditions required of them have already been performed, and, in the absence of investigation, the contrary can not well be affirmed.

Assuming that the above-mentioned contract to purchase still subsists (which may fairly be inferred from the papers here before me), and that there is not sufficient ground for its rescission on the part of the Government, I submit the following in answer to the questions proposed in your letter in the order in which they are quoted above.

(1) The act of March 29, 1888, authorizes the Secretary of the Treasury to purchase "a site." When this is done his authority to purchase is exhausted; he is not at liberty to buy another site in addition to the first. As such authority is limited to a single site, so the authority derived thereunder to select and contract for the purchase of a site is likewise restricted. Thus the latter authority does not extend to the selection of two or more sites, and to the making of contracts for the purchase of each at the same time, excepting, perhaps, where the contracts are expressly made to take effect successively and contingently upon the annulment of prior contracts or the termination thereof without purchase. Agreeably to this view, and on the assumption that the contract to purchase with Messrs. Wooley, Porter & Hubbell still exists, the Secretary is now without authority to select a second site and contract for its purchase. Should, however, that contract become rescinded or otherwise determined without any actual sale taking place, the authority to select and contract for the purchase of another site would revive.

(2) The obligation to pay for the property arises when a valid title thereto is conveyed to and becomes vested in the United States; hence not until acceptance of the deeds tendered by the vendors, previous to which the investigation

Customs Laws—Classification.

hereinbefore mentioned should be made, and it should appear therefrom that the conditions of the contract of purchase have been fully performed by them.

(3) The answer to the third question is contained in the preceding paragraph.

(4) I am not aware of any modification of the opinion referred to, nor am I prepared to say (speaking generally) that it should be modified.

I have the honor to be, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CUSTOMS LAWS—CLASSIFICATION.

Opinion of April 3, 1889 (*ante*, p. 272), respecting the classification for duty of certain descriptions of Chinese shoes, explained; and advised that the opinion referred to does not justify any change in the administration of the customs laws, except as to importations like those concerning which it was written.

DEPARTMENT OF JUSTICE,

May 6, 1889.

SIR: I reply to your communication of the 12th ultimo that the opinion rendered on the 3d of April, to which you refer, should be interpreted with reference to the facts set forth in the case submitted to which it was a reply. The underlying principle of the opinion is that "enumeration must be exhausted before assimilation can be resorted to."

Applying the principle to the case, it was intended to establish, in the opinion rendered, that the Chinese shoes described in the case of *Swayne v. Hager* were enumerated in the clause quoted in the opinion, and in no other; that, as there were not two enumerative clauses which might be applicable to the import, the last clause of section 2499 was inapplicable; that the prior clauses of section 2499 were limited to non-enumerated articles, and under the facts were not applicable; that even if the cotton clause, under which the court had ruled the goods should be classified, might be applied in some cases, yet as the hair clause cited provided for "all manufactures of every description composed wholly or in part of hair

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not specifically enumerated or provided for," it was a more specific general enumeration than the cotton clause, which was not so extended by the act of 1883 to imports composed wholly or in part of cotton, and therefore this last clause did not subject the import to the operation of the last clause of section 2499 of the act of 1883, which provides: "If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates."

The opinion referred to, thus limited to the facts of the case on which it was rendered, does not justify any change in the administration of the customs laws, except as to imports like those concerning which it was written.

I am, yours, respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

NAVAL ACADEMY.

Where certain naval cadets were found deficient at the semi-annual examination held at the Naval Academy in January, 1889, and, without the recommendation of the Academic Board, were granted leaves of absence by the Secretary of the Navy with permission to report to the Superintendent of the Academy to join the next fourth class: *Held* that the Secretary had no power to continue these cadets in the Academy without the recommendation of the Academic Board.

DEPARTMENT OF JUSTICE,

May 7, 1889.

SIR: Your communication of the 4th April, 1889, requests an opinion on the question whether the twenty naval cadets who were found deficient at the semi-annual examination held at the Naval Academy in January last, and who, *without the recommendation of the Academic Board of the Academy*, were granted leaves of absence by the then Secretary of the Navy, with permission to report to the Superintendent of the Academy to join the next fourth class, can be regarded as legally continued in the Academy by this action of the Secretary.

In my opinion the Secretary had no power to continue these cadets in the Academy without the recommendation of the Academic Board. This is removed beyond doubt by sec-

Treaty with Greece.

tions 1519 and 1525, Revised Statutes, which expressly provide that cadet midshipmen and cadet engineers, or naval cadets as they are now all designated under a later law (22 Stat., 285), "*found deficient at any examination,*" shall not be continued at the Academy or in the service, "except" or "*unless*" "*upon the recommendation of the Academic Board.*"

A regulation of the Naval Academy to the same effect had been in force for some years when the legislation now embodied in those sections was enacted, and the reason for this interference of Congress was, no doubt, to prevent the bad effect on the discipline of the institution produced by the occasional and perhaps not always well considered interferences of the Navy Department with the operation of that executive regulation.

The importance attached by Congress to the functions of the Academic Board in the economy of the Naval Academy is, it may be observed, shown to be undiminished by the recent act of March 2, 1889, entitled "*An act to regulate the course at the Naval Academy*" (Pamphlet Laws, 1889, pp. 878-879).

In conclusion it may be proper to refer to the observations of Mr. Solicitor-General Phillips in his opinion of the 10th July, 1877, on the wisdom and effect of the legislation contained in the above-mentioned sections 1519 and 1525 (15 Opin., 636, 637).

I have the honor to be, sir, your obedient servant,
W. H. H. MILLER.

The SECRETARY OF THE NAVY.

TREATY WITH GREECE.

The rights and privileges granted to the subjects of Greece by the first article of the treaty between the United States and that country, of December 22, 1837, are guarantied to them with all the force of law. The word "subjects," in the treaty, embraces corporations, joint-stock companies, and other associations, commercial and industrial, constituted in conformity with the law of Greece.

No legal objection exists to the Secretary of State instructing the United States minister at Athens to give the Government of Greece an assurance that such corporations and associations may exercise in the United States all the rights and privileges granted, as above, subject to the appropriate laws of the United States and those of the several States.

Treaty with Greece.

DEPARTMENT OF JUSTICE,

May 10, 1889.

SIR: By your letter of the 2d of April, 1889, you submit the following inquiry:

"Whether, in your opinion, there would be any objection to this Department instructing the minister of the United States at Athens to give the Hellenic Government an assurance * * * that corporations, joint-stock companies, and other associations, commercial and industrial, constituted in conformity with the laws in force in Greece, may exercise in the United States all their rights, including that of appearing before tribunals for the purpose of bringing an action or defending themselves, with the sole consideration in exercising such rights of always conforming to the laws and customs in force in this country."

The first article of the treaty of the 22d of December, 1837, between the United States and Greece provides:

"The citizens and subjects of each of the two high contracting parties may, with all security, for their persons, vessels, and cargoes, freely enter the ports, places, and rivers of the territories of the other wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories; to rent and occupy houses and warehouses for their commerce; and they shall enjoy generally the most entire security and protection in their mercantile transactions, on conditions of their submitting to the laws and ordinances of the respective countries."

By virtue of the provisions of the sixth article of the Constitution of the United States this treaty became a part of the supreme law of the land, and is obligatory as such in every court, both national and State. Whatever rights the treaty grants are guaranteed to the subjects of Greece with all the force of law.

The second section of the third article of the Constitution declares the judicial power of the United States "shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority * * * between a State, or the citizens thereof, and foreign states, citizens, or subjects."

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This section is enforced by proper legislation. Both the right and the remedy are thus assured to Grecian *subjects*. The word "subjects" in the Constitution is used as descriptive of those who owe perpetual allegiance to a government monarchial in form, as the word "citizens" is used to describe those who owe perpetual allegiance to our own government or other republics. The word "citizens" in the Constitution has been interpreted in the courts to include corporations and associations such as are described in your letter. The word "subjects" is entitled to a like interpretation, so as to include like foreign corporations and associations. The protection and guaranty to corporations, as citizens, of their lawful rights and remedies has been carefully considered and frequently affirmed by the Supreme Court of the United States.

In the case of the *Louisville Railway Company v. Letson* (2 How., 558) the law is thus declared :

"A corporation created and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued."

In the case of the *Ohio and Mississippi Railroad Company v. Wheeler* (1 Black, 296), the court, citing the above case with approval, declared the principle settled, in the following language :

"That where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence, and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible

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for the purposes of withdrawing the suit from the jurisdiction of a court of the United States."

The same doctrine is maintained in the cases of *Marshall v. The Baltimore and Ohio Railroad Company* (16 How., 329); *Covington Draw-bridge Company v. Shepherd* (20 How., 233), and *Cowles v. Mercer County* (7 Wall., 121).

The word "subjects" in the treaty embraces such corporations and associations as are described in your communication, and in the courts of the United States their legal rights, as defined and limited by the laws of the United States and of the several States, are fully protected by adequate remedies. There is, therefore, no legal objection to your communicating to the minister of the United States at Athens such instructions as are suggested in your letter, with the qualification which is annexed as a condition to the first article of the treaty, that the rights and remedies of such corporations and associations are to be enjoyed subject to the appropriate laws of the United States and the laws of the several States.

I am, yours respectfully,

W. H. H. MILLER.

The SECRETARY OF STATE.

OKLAHOMA.

The Indian title to the lands within the Territory known as Oklahoma having become extinguished, and the lands thrown open to settlement, that Territory has ceased to be "Indian country," and sections 2139 and 2140, Revised Statutes, are accordingly no longer applicable thereto; nor is the sale of spirituous liquors and beer in such Territory forbidden thereby.

Yet, for reasons stated, the Internal Revenue Department may decline to furnish special revenue stamps for the sale of intoxicating liquors within that Territory until Congress shall have time to consider the subject.

DEPARTMENT OF JUSTICE,

May 15, 1889.

SIR: I received your letter of the 17th of April, with its inclosure, in which you ask: "Whether the collector of internal revenue for the district of Kansas, to whose jurisdic-

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tion the Indian Territory was assigned some time ago by an Executive order, shall issue special-tax stamps to retail liquor dealers who desire to carry on business in that portion of the Indian Territory about to be opened up for settlement by the recent proclamation of the President pursuant to 'An act making appropriations,' etc., approved March 2, 1889?"

Also yours of the 19th of April, in which you ask: "Whether it is legal to sell beer and other spirits in Oklahoma, and whether this Department should furnish revenue-stamps for that purpose?"

Section 3448, Revised Statutes, which is a re-enactment of section 107 of the act of the 20th of July, 1868, provides:

"The internal-revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuffs, and cigars, shall be held to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same be within a collection district or not."

This section in terms extends the system of internal-revenue laws, as to distilled spirits, fermented liquors, and tobacco, throughout all the domain within the exterior boundaries of the United States.

In the *Cherokee Tobacco Case* (11 Wall., 616) the Supreme Court of the United States ruled that the Indian Territory was not an exception to the generality of the enactment, and as to distilled spirits, fermented liquors, and tobacco, the provisions of the internal-revenue laws were applicable to and enforceable therein.

The territory embraced in the President's proclamation to which you refer comes within this ruling, and the appropriate provisions of the system relative to stamps and penalties for violations of the law apply with full force.

The sale of beer and other spirituous liquors, if forbidden in that portion of the country to which the proclamation of the President of the 23d of March, 1889, applies, must fall within the prohibition contained in sections 2139 and 2140 of the Revised Statutes.

Section 2139 declares: "No ardent spirits shall be introduced under any pretense into the Indian country. Every person (except an Indian in the Indian country) who sells, exchanges, gives, barter, or disposes of any spirituous

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liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the *Indian country*, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department."

Section 2140 declares: "If any superiutendent of Indian affairs, Indian agent, or commanding officer of a military post has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the *Indian country* in violation of law, such superintendent, agent, subagent, or commanding officer may cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched, and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of each person shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall moreover be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country except such as may be introduced therein by the War Department. In all cases arising under this and the preceding section Indians shall be competent witnesses."

These sections are by their terms limited to the "Indian country." Their intent is to protect the Indians from the pernicious effect of intoxicating drinks, which is, and has been, the bane of their race. Whenever a portion of the territory of the United States ceases to be the exclusive and rightful place of residence of the Indians, and has become legally appropriated to settlement by the white race, the provisions of the Indian code, of which the two sections quoted

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are a part, if they had been before applicable, lose their effective force.

The lands concerning which the questions submitted arise had been a part of the Indian Territory over which the Indian title had not been extinguished. When in that condition the rightful and exclusive ownership, with the possession incident to it, was vested in the Indians. While thus owned by the Indians the sections quoted were in full operation; but, on the 1st of March, 1889, in execution of previous negotiations with the Indians, Congress passed an act (Statutes of 1888 and 1889, page 757) by which, as to a part of the lands, the entire title, with the right of exclusive possession, which had been vested in the Muscogee and Creek Indians, became vested in the United States. On the 2d of March, 1889, Congress passed an act (Statutes of 1888 and 1889, page 1005) for the purchase of the balance of the land involved in your inquiries from the Seminole Indians, in pursuance of which on the 16th day of March, 1889, the land was duly conveyed to the United States. By the last-named act the land acquired was made a part of the public domain; land offices were provided for the disposal of the land to actual settlers; and the President was authorized to make public proclamation of the opening of the Territory for the disposal of it. In pursuance of the act the land was by proclamation opened to settlement on the 22d day of April, 1889. The Indian title to the land was thus extinguished and vested in the United States. Formal possession has been taken in pursuance of the purchase, and doubtless much of it has been legally occupied by white settlers. The rights of the Indians to or their power of government over the land no longer exist.

What constitutes "Indian country" in the sense in which it is used in sections 2139 and 2140 has frequently received careful consideration by the Supreme Court of the United States, and the signification of the phrase has a well-defined judicial interpretation.

In the case of *Bates v. Clark* (95 U. S., 204) Captain Bates was the defendant in the court below in an action of trespass for the seizure of a "lot of whisky." He defended under the sections of the law above cited, alleging that the seizure

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was made in the Indian country. Judgment was rendered against him. On writ of error to the Supreme Court of the United States the judgment was affirmed. Miller, Justice, in delivering the opinion of the court, in answer to the question, "What, then, is Indian country within the meaning of the acts of Congress regulating intercourse with the Indians," replied:

"The simple criterion is that, as to all the lands thus described, it was Indian country wherever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it and no longer. As soon as they parted with the title it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

The opinion is supported by the cases of *American Fur Company v. United States* (2 Peters, 358) and *United States v. Forty-three Gallons of Whisky* (93 U. S. R., 561). The definition is quoted with approval in the case of *Ex parte Crow Dog* (109 U. S. R., 561).

As shown by the facts above stated, the Indian title to the land referred to in your letters has been extinguished. The land has been thrown open to the legally qualified people of the United States for settlement as a part of the public domain. It is not "Indian country." The provisions of sections 2139 and 2140 are not applicable to it, and the sale of "beer and other spirits" in it are therefore not forbidden thereby.

But while the sale of intoxicating liquors is not forbidden in the Oklahoma region and the internal-revenue laws relative to them are in force, their unrestricted sale in that country, in its present state, would be a public disaster. The land lies immediately adjacent to and is partly surrounded by Indian reservations, occupied by large numbers of Indians of different tribes. That they shall be protected from the baneful effect of intoxicating drikis, is a well-established policy of the Government. An unrestricted sale of such liquors in their immediate vicinity would be almost as harmful and dangerous to the public peace as on the reservations.

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The laws which were passed at the last session of Congress, opening the Territory to settlement, are incomplete. Congress doubtless intended to speedily supplement them with appropriate adequate legislation. No Territorial nor State organization exists. No county, nor municipal organizations, officers, or laws are provided for. The influx of population has been sudden and from widely different parts of the country. For a considerable period of time the moral force of good neighborhood and society may not have power to keep in check the lawless element. For a short time a state of legal chaos must exist. The obvious inference from this condition of affairs is that the peace will be best promoted by temporarily declining to assess special taxes, or issue licenses for the sale of intoxicating liquors in that region, until Congress shall have time to take such action as the emergent necessity of the case calls for. You may refuse temporarily to issue such licenses without a violation of law, for sections 3240 and 3241 clearly contemplate that when a license is granted it shall specifically define and describe some known place of doing business under it. There being no counties nor legally organized towns whose limits are capable of definition, nor, as yet, any permanent well-known buildings, the legal description and location required by the statutes can not with sufficient certainty be set forth in the licenses. Intelligent public opinion will approve delay in the issue of licenses and Congress will doubtless ratify it. If the unprincipled and reckless should attempt to make sales without license the offenders may be severely punished for a violation of the revenue laws. In this manner the evils that would be incident to a general unrestricted sale of intoxicating liquors may be to a large extent prevented.

I am, therefore, of opinion that, in the exercise of a judicious discretion in the execution of the internal-revenue laws, you may decline to issue licenses for the sale of intoxicating liquors within that region until Congress shall have time to consider the subject.

I am, yours respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Distribution of United States Reports.

DISTRIBUTION OF UNITED STATES REPORTS.

In making up complete sets of the Supreme Court Reports for the *places* to be supplied under the act of February 12, 1889, chapter 135, the volumes heretofore distributed to the circuit and district *judges* are not to be taken into account.

The distribution of the reports provided for by that act has no reference whatever to former distributions of reports to judges.

Where the circuit and district courts hold their sessions in the same rooms, one set of reports only are to be provided for the places where such courts sit. But where these courts hold their sessions in different buildings or in different rooms of the same building, a set of reports are to be provided for the place where each court sits.

Places where the Territorial courts sit are not within the provisions of the act.

DEPARTMENT OF JUSTICE,

May 15, 1889.

SIR: Your communication of 24th April, ultimo, asking an opinion on certain questions which have arisen in carrying out the act of Congress of February 12, 1889, entitled "An act to amend section six hundred and eighty-three of the Revised Statutes relating to the distribution of the reports of the Supreme Court," has received my consideration.

The first section of the act provides as follows:

"That section six hundred and eighty three of the Revised Statutes of the United States be, and the same is hereby, so amended as to provide for the distribution, by the Secretary of the Interior, of one set of the official reports of the decisions of the Supreme Court of the United States or an exact reprint of the same, comprising volumes one to one hundred and twenty-two, inclusive, or so many volumes as may be needed with those already supplied to make one such set, to each of the places where the circuit and district courts of the United States are regularly held: *Provided*, That where a circuit court and district court are both held at the same place, only one such set, or so many volumes as may be needed with those already supplied to make one such set, shall be distributed to that place: *Provided further*, That for the sets or parts of sets distributed as aforesaid not exceeding two dollars per volume shall be paid; and said reports shall be kept by the clerks of said courts and their suc-

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cessors in office for the use of said courts and the officers thereof; and the sum of twenty-eight thousand dollars, or so much thereof as may be necessary, is hereby appropriated to carry out the above provision."

It is in the application of this section to its subject matter that have arisen the questions submitted for opinion. These questions I now proceed to treat in their order.

The first question is: Whether the volumes of Supreme Court reports already supplied by the Department of Justice to the circuit and district judges of the United States are in all cases to be regarded as a part of the sets required by the law above referred to to be furnished, or only in cases where the judges reside in places at which circuit and district courts are held, or in no case whatever.

The law seems to imply that those volumes already supplied by the Department of Justice are to be regarded as now and hereafter available for the use of the circuit and district courts, and that only those not hitherto furnished are to be purchased under its provisions. Some of the judges, however, take the ground that these volumes are designed for their personal use, and are not, therefore, to be counted in completing sets under the provision of the new law. If this view is adopted, the number of volumes to be purchased will be very largely increased over what it otherwise would be.

It does not seem to me that there is anything in this act which interferes with the right of each circuit and district judge to continue to receive a copy of each volume of the Reports of the Supreme Court of the United States for his private use while holding his commission as a judge, nor do I see anything there which appropriates to any other use the volumes of said reports furnished to these judges up to the date of the approval of the act.

As I read the act, it allows the law existing at the time it went into operation as to the distribution of the Supreme Court reports among the judges to remain in full operation, and makes an additional provision for distributing full sets of these reports "to each of the *places* where the circuit and district courts of the United States are regularly held," *

* * for the use of said courts and the officers thereof."

I am of opinion that the volumes heretofore furnished

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the circuit and district *judges* are not to be taken into account in making up complete sets of the Supreme Court reports for the *places* to be supplied under the law. The language of the act which is referred to as perhaps favoring that interpretation is where it provides that the volumes to be supplied to each place shall be only so many "as may be needed *with those already supplied to make one such set.*" Any difficulty caused by this language would seem to be removed by the information furnished by the files of this Department that there are already incomplete sets of the Supreme Court reports at some of the places where circuit and district courts of the United States are held, which are the property of the United States.

In interpreting a statute we may look at the surrounding facts just as in the case of a private writing, and it sometimes occurs that but for such extraneous evidence it would be difficult to make sense of the law. (*Platt v. Union Pacific R. R. Co.*, 99 U. S., 48; *United States v. Union Pacific R. R. Co.*, 91 U. S., 72.)

Reading the statute, then, by the light of this extraneous information, I am clearly of opinion that the distribution of reports provided for *has no reference whatever to former distributions of reports to judges.*

The second question is as follows: Whether, when the circuit and district courts are holden in the same city, as for instance, Boston, but in different buildings or in different parts of the same building, so that the library of the circuit court is not conveniently accessible to the officers of the district court, a set is required by the law to be provided for each court. In other words, whether the phrase "the same place," used in the law, refers to the town or city or has a more limited application.

I am of opinion that the meaning of the law is that where, as in some instances is the case, the circuit and district courts of the United States for certain districts, sitting at different times, respectively, hold their sessions in the same rooms, one set of reports shall be furnished for the places where such courts sit, and that, in all cases where the circuit and district courts for any district hold their sessions in different buildings or in different rooms of the same building, a set of reports shall be provided for the place where each court sits,

National Bank in Oklahoma.

for the use of the court and the officers thereof, irrespective of any consideration of convenience or proximity. This seems to me to be the intent of the act, which provides for a want seriously felt in many places where United States courts are held, and which should therefore be liberally interpreted, according to the well-known rule applicable to the statutes affording remedies for public inconveniences.

The third question is as follows: Whether the law requires that these reports shall be supplied for the use of the Territorial courts, a number of applications having been made by the judges of said courts for said reports under the provisions of this act.

I am of opinion that the places where the Territorial courts are held do not come within the act, it having been repeatedly decided by the Supreme Court that Territorial courts are not embraced by the terms "circuit and district courts of the United States." (See *Reynolds v. United States*, 98 U. S., 154, and cases cited.)

I have the honor to be, yours, very respectfully,
W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

NATIONAL BANK IN OKLAHOMA.

Under existing legislation relating to the establishment of national banking associations, and in the present condition of Oklahoma (being without a government and system of laws), such banking associations can not lawfully be authorized and established in the Territory known by that name.

DEPARTMENT OF JUSTICE,
May 18, 1889.

SIR: Your communication of April 4, 1889, asks an opinion as to whether national banks may be lawfully authorized and established in the region of country recently acquired and thrown open to settlement, and commonly known as Oklahoma.

It is provided by section 5146, Revised Statutes, as follows: "Every director (of a national banking association) must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or district in which the associa-

National Bank in Oklahoma.

tion is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office." This provision of law I understand to be in force still.

It would seem that this requirement of one year's residence in the State, Territory, or district in which a national banking association is located, as to at least three-fourths of the directors, presents a barrier to the organization of any such institution in Oklahoma for quite a year to come, as it may be assumed that no person elected a director of any such institution to be located in Oklahoma would possess, sooner, the qualification as to residence.

The legislation authorizing national banking associations to be established in a Territory has in view, I think, a Territory regularly organized, with a government and a system of laws for the protection of persons and property, and not a Territory like Oklahoma without any government at all and destitute of laws for the regulation of the civil relations of its people—a Territory without rules of property, and without even customs to take the place of legislation.

It was not a Territory in the condition of Oklahoma that Congress could have referred to in section 5197, Revised Statutes, which declares that any association may charge on loans or discounts made, or on notes, bills of exchange, or other evidences of debt, "interest at the rate allowed by the laws of the * * * Territory * * * where the bank is located, and no more, except," etc.

Nor could Congress have had such a Territory in contemplation when it directed in section 5226, Revised Statutes, that on the failure of a national banking association to redeem its circulating notes they should be protested "by a notary public," and yet have omitted to provide the Territory with such an officer for that purpose.

It is not necessary to look further into the legislation on this subject to establish the proposition that there is no authority to make the dangerous experiment of locating a national banking association in a country destitute of the laws and sanctions that are essential to the safety of a bank.

Very respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Dumping Material in the Hudson.

DUMPING MATERIAL IN THE HUDSON.

The authority conferred upon the Secretary of War by the act of June 29, 1888, chapter 496, does not extend to the waters of the Hudson River as far distant from New York harbor as Troy, Albany, and New Baltimore.

The term "tributary waters," as used in that act, covers only such parts of the river as, in a broad sense, can be regarded as connected with that harbor.

DEPARTMENT OF JUSTICE,
May 21, 1889.

SIR: I have the honor to acknowledge the receipt of your letter of the 20th instant, asking my opinion "as to the powers of your Department, and its jurisdiction under the act of Congress approved June 29, 1888, relative to the deterioration of the channel of the Hudson River near Troy, Albany, and New Baltimore, caused by the dumping of dredged material into the channel under the authority of the State of New York; that is, under contracts made with the State for deepening the channel by dredging out various points between the towns named."

Answering your inquiry I beg to say, that the jurisdiction conferred by the act referred to is limited "To the tidal waters of the harbor of New York, and its adjacent or tributary waters, or to those of Long Island Sound." And by section 5 of said act provision is made for the designation by the President of an officer to be known as "Supervisor of the Harbor," to act under the direction of the Secretary of War in enforcing the provisions of the act, and detecting offenders against the same. The only expression in the act which would seem to give any color to the claim of jurisdiction in the waters of the Hudson River, as far away as the points named, is "tributary waters;" but I think it is plain from the connection that by the use of these words Congress did not intend that the authority of this supervisor of the harbor should extend to the remote limits of the navigable waters of tributary rivers. On the contrary, I am of the opinion that the term "tributary waters" must be restricted so as to cover only such parts of the river as, in a broad sense, can be regarded as connected with the harbor

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of New York. It can hardly have been intended, for instance, that a person designing to excavate or dredge the river 150 miles above New York should, before commencing work, apply to the harbor-master of New York for a permit as provided in section 3 of the act in question.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

APPOINTMENT TO OFFICE.

By section 1754, Revised Statutes, it is made the duty of those making appointments to civil offices to give a preference, other things being equal, to the class of persons named in that section; but the matter of capacity and personal fitness for the place is for the determination of the appointing power.

DEPARTMENT OF JUSTICE,

May 24, 1889.

SIR: Your note of May 21, inclosing the opinion of the Assistant Attorney-General for the Post-Office Department as to the construction of section 1754 of the Revised Statutes of the United States, and asking my opinion upon the question whether that section is mandatory or not, is received.

In response I have to say that I concur in the opinion of the Assistant Attorney-General upon that question. I have no doubt that it was the purpose of Congress to make it the *duty* of those making appointments for civil offices to give a preference, other things being equal, to the class of persons named in this section. Of course, as the Assistant Attorney-General for the Post-Office Department says, the matter of capability and personal fitness is still a matter of judgment for the appointing power.

Respectfully, yours,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

Arizona Legislature.

ARIZONA LEGISLATURE.

Statutory provisions regulating the assembling of Territorial legislatures reviewed; and, upon consideration thereof, advised that the governor of Arizona Territory is without power to convene a special session of the Territorial legislature.

DEPARTMENT OF JUSTICE,

May 29, 1889.

SIR: I have the honor to acknowledge the receipt of a telegram from the governor of Arizona Territory, addressed to the President, asking his consent to the calling of an extra session of the Territorial legislature, which you have referred to me with the request that I give an early opinion upon the question whether an extra session can be called, and whether the President's consent thereto is essential. Accompanying said telegram is a copy of a communication addressed to you by the governor of Arizona Territory, and also a copy of the opinion of the Attorney-General upon the question whether the legislature of Arizona can legally continue in session after the expiration of sixty days from its organization.

The general law governing the sessions of the legislative assemblies of the several Territories as to the time of assembling and duration of the session is found in section 1846 Revised Statutes, and the act of December 23, 1880 (Supplement Revised Statutes, 586), amending section 1852, Revised Statutes.

Section 1846 provides that the sessions of the respective legislative assemblies shall be biennial, and that each legislative assembly shall fix by law the day of the commencement of its regular sessions.

By section 2880, Revised Statutes of Arizona, it is provided that "the legislative assembly shall meet at the capitol on the third Monday in January, 1889, and every two years thereafter."

The duration of said sessions is limited by the act of December 23, 1880, to sixty days, and for the sessions covering that period appropriations have from time to time been made by Congress. The appropriation for the legislative expenses of Arizona Territory for the session of 1889 was made by the

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legislative, executive, and judicial appropriation act of July 11, 1888 (25 Stat., 276), appropriating therefor the sum of \$24,250. No provision was made for legislative expenses for the Territory of Arizona by the act making appropriation for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1890. (25 Stat., 726.)

Section 1886, Revised Statutes, provides that "no session of the legislature of a Territory shall be held until the appropriation for its expenses has been made," and section 1888, Revised Statutes, provides that "no legislative assembly of a Territory shall in any instance or under any pretext exceed the amount appropriated by Congress for its annual expenses."

The foregoing are all the provisions of the statutes relative to the biennial session of the legislature. The governors of the Territories of Washington, Idaho, and Montana are authorized under section 1923, Revised Statutes, to convene an extra session of the legislative assembly on extraordinary occasions at any time. Said section is as follows:

"In each of the Territories of Washington, Idaho, and Montana, the governor shall have the power to call the legislative assembly together by proclamation, on an extraordinary occasion, at any time."

This power given to the governors of the said three Territories seems to have been contemplated by the organic acts of these three Territories, which provide that "no session *in any one year*" (which implies there may be a session oftener than once in two years) "shall exceed the term of forty days," etc., whereas in the acts organizing the other Territories it is provided "that *no one session* shall exceed the term of forty days," etc.

Under the authority contained in this section the governor of Montana convened an extra session of the legislative assembly of said Territory April 14, 1873, and Congress subsequently, in making an appropriation to defray the expense of said extraordinary session by the deficiency appropriation act of June 22, 1874 (18 Stat., 135), embodied in said act this provision: "But hereafter no extraordinary session of the legislature of any Territory, *wherever the same is now authorized by law*, shall be called until the reasons for the same have

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been presented to the President of the United States and his approval thereof has been duly given." This provision is embodied in the Supplement to the Revised Statutes (page 65) and is now in force, applicable to all the Territories.

From the authorities contained in the sections of the Revised Statutes and the act above referred to, it seems clear that the governors of the several Territories have no power to convene extra sessions of the legislative assemblies, except in the Territories of Washington, Idaho, and Montana, and that since the act of June 22, 1874, the governors of these Territories have no such power except upon the approval of the President.

Reference is made by the governor of Arizona to section 2939 of the Revised Statutes of Arizona of 1887 for the authority of the governor to convene the Territorial assembly of that Territory in extra session. The particular paragraphs of the section referred to are as follows:

2939 (Sec. 1). "In addition to the powers conferred upon the governor by the Constitution and the laws of the United States, he has the power and shall perform the duties prescribed in this chapter.

* * * * *

(Sec. 16). "He may convene the legislature by proclamation on extraordinary occasions by the consent of the President or Congress of the United States." Revised Statutes of Arizona, 524.

The question therefore arises whether this act of the Territorial legislature enlarging the powers of the governor of the Territory is within the scope of its authority and not in conflict with existing laws of the United States.

The organic law contained in the Revised Statutes and subsequent legislation applicable to all the Territories provides that "the legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." (Rev. Stat., sec. 1851.)

It further declares that the secretary of the Territory shall transmit copies of the laws and journals to the President and the President of the Senate and Speaker of the House of Representatives for the use of Congress (section 1844, Rev. Stat.), and section 1850, Revised Statutes, provides that "all

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laws passed by the legislative assembly and governor of any Territory, except in the Territories of Colorado, Dakota, Idaho, Montana, and Wyoming, shall be submitted to Congress, and if disapproved shall be null and of no effect."

After a careful consideration of the foregoing provisions I am satisfied that in the Territories of Washington, Idaho, and Montana, the same being authorized by law, the governor of such Territory may, with the consent of the President, convene extraordinary sessions of the Territorial assemblies, notwithstanding no provision may have been made by Congress for the legislative expenses of said session, and that section 1886, providing that "no session of the legislature of a Territory shall be held until the appropriation for its expenses has been made," has reference solely to the regular biennial session provided for by law, and does not restrict or limit the power of the governor, if approved by the President, from convening extraordinary sessions of the legislature, although no appropriation may have been made therefor.

It is obvious that it was not contemplated that the power conferred upon the governor, with the consent of the President, to convene the Territorial assemblies in extraordinary session should be dependent upon the action of Congress in making appropriation therefor before it could be exercised, because extraordinary sessions would not be required except when the exigencies of the occasion demanded prompt action on the part of the executive, and it was not contemplated that the necessity for such session could always be known while Congress was in session, or that Congress should be convened to make provision for this purpose.

I am therefore of the opinion that the governor of those Territories, where authority is expressly conferred by law to convene the Territorial assemblies in extraordinary session, may submit the reason for calling an extraordinary session to the President, and if he approve the same such session may be called although no appropriation has been made for that purpose.

The difficult and important question to determine, however, is whether the governor of Arizona Territory has any power to convene an extra session of the Territorial assembly.

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If such power exists, it can only be derived from the act of the Territorial legislature above cited conferring this power, because no such power exists by the organic law; but, on the contrary, as such power is expressly conferred by the organic law upon governors of the Territories of Washington, Idaho, and Montana, by the well-established canon of construction such power is therefore withheld from the governors of the other Territories.

All acts of the Territorial legislature inconsistent with the organic act are void.

The question came before the Supreme Court in the case of *Ferris v. Higley* (20 Wall., 375), whether the act of the legislature of Utah Territory conferring on the probate court general jurisdiction in civil and criminal cases, in both chancery and common law, is inconsistent with the organic act.

The act of September 9, 1850, establishing a Territorial government for Utah Territory, contained the provision common to all Territories, that the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of the act, and that all laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if *disapproved shall be null and of no effect*.

With this act of Congress in force the Territorial legislature in 1855 enacted a law giving to probate courts in their respective counties power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment.

Congress had not enacted any act *disapproving* of this Territorial act, and thus rendering it by Federal legislation null and of no effect. But the court held that "The acts of the legislature are not the only law to which we must look for the powers of any of these Territorial courts. The general history of our jurisprudence and the organic act itself are also to be considered, and any act of the Territorial legislature inconsistent with the latter must be held void."

A similar question arose in the case of *Miners' Bank v. Iowa* (12 How., 1), in which it was contended that as Congress reserved the power of disapproving and thereby annulling the

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acts of the Territorial government, and had in the exercise of that power stricken out several of the provisions of the act under consideration and assented to the residue, that it should be regarded as an act by Congress rather than that of the Territorial government; but the court held to the contrary. See also *National Bank v. County of Yankton* (101 U. S., 129) as to authority of Congress in relation to the government of the Territories, making the enactments of Congress supreme and in effect the constitution of the respective Territories.

From the authorities cited I am of the opinion that the Territorial legislature of Arizona had no authority to confer upon the governor of said Territory the power to convene the legislature in extraordinary session, and that although the act conferring such power was submitted to Congress in compliance with the organic law, and no action was taken by Congress disapproving of the same, that it can not be considered an act of Congress authorizing and confirming the same, and, being inconsistent with the organic law, is therefore void. If this view is correct it follows that no power exists in the governor of Arizona to convene a special session of the Territorial legislature.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

CLERKS AND EMPLOYÉS IN THE POSTAL SERVICE.

The authority conferred upon the Postmaster-General by the act of March 2, 1889, chapter 374, to classify and fix the salaries of the clerks and employés in first and second class post offices is not merely discretionary with him. It imports a duty to make the classification of such salaries which is provided for in the act.

DEPARTMENT OF JUSTICE,

June 3, 1889.

SIR: The question submitted in your letter of May 24th for an opinion is whether, under the provisions of the act making the appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1890, approved March

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2, 1889 (Pamphlet Laws, p. 841), you are bound to make the classification of salaries as therein set forth, or are merely invested with authority so to do in your discretion.

This question is one of not a little difficulty. The language used imports, in its ordinary use, simply authority with a discretion. On the other hand, where public rights or duties are involved, words which ordinarily import merely permission or authority are held to impose a duty or an obligation. (*Ritchie v. Franklin County*, 22 Wall., 68; *The Supervisors v. The United States*, 4 Wall., 435; 15 Opin., 321.) Thus "may" is often construed as "shall" or "must;" "authorized" is held to mean the same as "required;" and the question is in which sense the word "authorized" is used in the statute under consideration. This statute is the Post Office appropriation bill. There is, however, injected into it legislation foreign to the ordinary scope of such a bill. The act provides "for compensation of clerks in post offices six million five hundred and fifty thousand dollars;" and then follows the language to which your inquiry is addressed. "And that the Postmaster-General be, and is hereby, authorized to classify and fix the salaries of the clerks and employés attached to the first-class post offices from and after July 1, 1889, as hereinafter provided: *Provided, however,* that the aggregate salaries as fixed by such classification shall not exceed the same hereby appropriated, namely." Then in minute detail the classification is fixed, which is designed to embrace all employés of first-class post offices, commencing with the assistant postmaster, the number of grades into which each class of employés is divided being minutely stated, and at the end a proviso (bottom of page 843) that when the salaries so stated are adjusted and fixed no clerk or employé shall be promoted or advanced in grade or salary without the approval of the Postmaster-General in accordance with the requirements of section 464, Postal Laws and Regulations of 1887. "And hereafter postmasters at offices of the first and second classes shall submit rosters of the clerks attached to their respective offices to the Postmaster-General, to take effect from the first day of the fiscal year, July first, instead of January first, as heretofore, and no roster shall be considered in effect

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until approved by the Postmaster-General." Then follows the following sentence: "That all acts and parts of acts that conflict with the provisions herein before stated are hereby repealed."

It should be stated that the same provisions are made to apply to second-class as to first-class post offices.

So far as fixed by legislation the employés in these post offices have heretofore been divided into four grades. (Rev. Stat., sec. 163; 22 Stat. L., p. 406, subdivision 2 of sec. 6.) As matter of fact, I am advised by the assistant attorney-general of the Post Office Department that the salaries of the employés in first and second class post offices at the present time are divided into more than four grades, and are in fact substantially graded according to the provisions of the act under consideration.

However that may be, the minuteness of detail with which Congress has seen fit to treat this subject matter in this act, together with the fact that the proviso, commencing on the bottom of page 843, seems to contemplate that the classification detailed in the act is to be made, and provides what shall and shall not be done "hereafter", induces the conclusion in my mind that it is the legislative will that these salaries shall hereafter be graded upon the basis of this legislation. I am strengthened in this view by the supposition, which I think is authorized, that the aggregate of the appropriation was made with reference to this classification.

Furthermore, to hold that this act gives only a discretionary authority to the Postmaster-General is to assume that Congress framed this legislation in all its minuteness of detail, and then left it to the Postmaster-General to say whether it should ever have the force of law, or enter into the administration of the affairs of the Department or not. I can not believe that such was the intention of Congress.

Respectfully yours,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

Supervising Examiners of the Bureau of Pensions.

SUPERVISING EXAMINERS OF THE BUREAU OF PENSIONS.

The special authority given by the act of July 11, 1888, chapter 615, to appoint or detail five supervising examiners in the Bureau of Pensions, with headquarters in the District of Columbia, is prohibitory of the appointment or detail of a greater number for the District or for places other than the District.

DEPARTMENT OF JUSTICE,
June 6, 1889.

SIR: I have considered your communication of the 22d May, ultimo, requesting an opinion on the question whether more than five supervising special examiners in the Pension Office may be appointed, "provided their headquarters are at places other than in the District of Columbia?"

The question arises upon the act of July 11, 1888 (Pamphlet Laws, p. 286). The act after, *inter alia*, appropriating a sum sufficient to pay the per diem allowance and the actual and necessary expenses of "special examiners, or other persons employed in the Pension Office detailed for the purpose of making special investigations pertaining to said office" when "absent from home," contains a proviso that five special examiners, or clerks detailed and acting as supervising examiners, and special examiners or clerks detailed as such, not exceeding three in number, with headquarters in the District of Columbia, may be allowed, in addition to their salaries *and in lieu of per diem and all expenses for subsistence, a sum not exceeding nine hundred dollars each per annum.*" * * *

The only provision made in the law for supervising examiners is the one just given. They and the three special examiners, also provided for, are required to perform duty in this District, and, accordingly, are placed on a different footing as to pay and allowances from the one hundred and fifty special examiners provided for in the paragraph *immediately following*, as "*an additional force of one hundred and fifty special examiners for one year.*"

In view of the particularity with which Congress has dealt with the subjects of supervising and special examiners, I see no reason whatever for the implication that Congress intended to authorize the appointment of supervising exam-

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iners, *without limitation as to number*, to perform duty outside this District. The special authority to appoint or detail five supervising examiners with headquarters in the District of Columbia must, in my opinion, be regarded as prohibitory of the appointment or detail of a greater number for the District or for any other place.

I have the honor to be, sir, your obedient servant,
O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

EMPLOYMENT OF COUNSEL.

The provision in the act of July 18, 1888, chapter 677, making an appropriation "for carrying out the provisions of the act of May 29, 1884, establishing the Bureau of Animal Industry," does not authorize the Commissioner of Agriculture to employ counsel for the defense of employés of the Bureau for acts done by them in carrying out such provisions under its direction. Employment of counsel in such cases is governed by sections 189, 362, and 363 Revised Statutes.

DEPARTMENT OF JUSTICE,
June 6, 1889.

SIR: I have duly considered your communication asking an opinion as to whether the Bureau of Animal Industry, in the Department of Agriculture, has authority under the provision in the act of July 18, 1888, making an appropriation for the salaries and expenses of that Bureau, to retain and compensate legal counsel for the defense of employés of the Bureau sued for acts done by them in carrying out, under the direction of the Bureau, the act of May 29, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals."

The provision of the act of July 18, 1888, referred to, is in the following words:

"For carrying out the provisions of the act of May twenty-ninth, eighteen hundred and eighty-four, establishing the Bureau of Animal Industry, five hundred thousand dollars; and the Commissioner of Agriculture is hereby authorized to

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use any part of this sum he may deem necessary or expedient, and in such manner as he may think best, to prevent the spread of pleuro-pneumonia, and for this purpose to employ as many persons as he may deem necessary, and to expend any part of this sum in the purchase and destruction of diseased or exposed animals, and the quarantine of the same, whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia from one State into another. * * *

At the time this provision went into effect sections 189, 362, and 363 of the Revised Statutes were in force.

Section 189 provided :

"No head of a Department shall employ attorneys or counsel at the expense of the United States ; but when in need of counsel or advice shall call upon the Department of Justice, the officers of which shall attend to the same."

Section 362 provided :

"The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties ; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct."

Section 363 provided :

"The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings."

If these provisions of the Revised Statutes are still in force, and I will assume that they are so for the present, it is difficult to see how you have authority to employ counsel for the purposes mentioned in your communication.

It may be that the acts of the employés of the Bureau of Animal Industry, when they are not engaged in executing the provisions of the act of May 29, 1884, relating to

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the transportation of live stock entering into foreign or interstate commerce, must be largely performed under the authority of State law; still they are, at the same time, performed by direction of the National Government and at the expense of its Treasury, so that it would seem to follow inevitably that if an employé of the Bureau of Animal Industry be sued for acts done by him by State authority, and under the orders of that Bureau, a case has arisen for the attention of a regular law officer of the Government or of some provisional law officer to be appointed by the Attorney-General under section 363, Revised Statutes.

The public interest that called for the use of the money of the United States in extirpating and preventing the spread of a malignant cattle disease is the public interest that requires that the paid agents of the United States who may be sued for acts done in advancement of that object, it makes no difference whether under State or National authority, should be defended by the law officers of the United States.

If, then, the legislation contained in the sections of the Revised Statutes given above is still in force, it would seem clear that the question submitted is governed by them.

The next inquiry is whether the provision above quoted from the act of July, 1888, has supplanted or otherwise affected the previous legislation regulating the matter in hand.

The provision in question contains no words of express repeal or of reference to that legislation. If then that legislation is affected by the provision in question, it must be by force of the words empowering the Commissioner of Agriculture "*to employ as many persons as he may deem necessary*" to carry out the purposes of the act.

Without stopping to consider whether counsel employed to defend agents of the Bureau of Animal Industry could under any circumstances be held to fall within the class of persons named in the law, it may be safely said that it would not be admissible to give such scope to this general language as would operate a repeal, so far as the Bureau of Animal Industry is concerned, of the legislation regulating the subject of employing counsel for the Government—legislation which was intended to apply to all branches of the Government, which has remained in force for many years, and the want of which had led to some abuses.

Attorney-General.

Repeals by implication are never favored, as they carry with them the imputation that the legislature was ill-informed or inattentive with reference to the state of the law in force before the passage of the repealing statute, and the judiciary properly hesitate to seem to make such a reflection on a co-ordinate department of the Government unless compelled to do so by the impossibility of making the last statute stand in harmony with previous legislation. (*Red Rock v. Henry*, 106 U. S., 596, and *Cheu Heong v. United States*, 112 U. S., 536, and the authorities cited in these cases.)

So far, however, from the language of the act of July 18, 1888, being repugnant to the above quoted sections of the Revised Statutes, it might with good reason be said that this language requires some latitude of interpretation to make it embrace the subject of counsel to be employed for the defense of agents of the Bureau of Animal Industry who may be sued.

It does not appear admissible upon any sound rule of interpretation to hold that the act of July 18, 1888, authorizes the Secretary of Agriculture to retain counsel for the purposes mentioned; on the contrary, the presumption is that Congress did not intend by the general words of the act to go back to the old practice which had been found so objectionable.

It is, indeed, fair to conclude that if Congress had purposed to make so radical a change in its policy, even though that change was to be so circumscribed, it would not have left its intention to be gathered by implication.

I have the honor to be, sir, your obedient servant,
O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF AGRICULTURE.

ATTORNEY-GENERAL.

Where, from an examination of the papers submitted, it appeared that the question proposed (which involved the construction of a statute) did not spring out of any case actually existing in the administration of the Department seeking advice, the Attorney-General deemed that it would be improper for him to give an official opinion thereon.

Attorney-General.

DEPARTMENT OF JUSTICE,
June 17, 1889.

SIR: I have the honor to acknowledge the receipt of your favor of June 7, wherein you ask "Whether the act of February 26, 1885 (23 Stat., 332), prohibiting the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia, as amended by the act of February 23, 1887 (24 Stat., 414), and by the amendment contained in the deficiency bill approved October 19, 1888 (25 Stat., 566), includes within its prohibition certain professors or men of learning in Europe whom the managers of the Catholic University of America desire to employ in their university as lecturers?"

Inclosed you also submit a letter from Mr. M. F. Morris, "as attorney for the newly established Catholic University of America," in which he calls your attention to certain doubts that have been suggested with reference to some proceedings of the managers of the institution "under the act referred to," and requests "that you will be pleased to advise him whether such proceedings, or rather *contemplated* proceedings, are in contravention of that act or of any other law of the United States." He further says that these proceedings have "not yet assumed the shape of contract, but it is desired that it should do so as soon as possible," and expresses the wish to have your official opinion, and, if need be, your official action on the subject, and in conclusion says "the managers of the university desire to be advised by you whether their construction of the acts is not the correct one."

From this statement it appears that the question submitted does not spring out of any present actually existing case "arising in the administration" of your Department. It is a question in a hypothetical case, and one indeed which may never arise, and calls in advance for an opinion as to what the Department would hold in the future upon a somewhat indefinite state of facts.

That being the case, it is respectfully submitted that this Department is not permitted, by statute or precedent, to give an opinion upon it.

Attorney-General.

Allow me first to call your attention to Revised Statutes, section 356, as bearing generally upon the question, which reads:

"The head of any Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department."

Next I respectfully refer you to the following extracts from opinions of this Department, which will serve to show how uniformly it has adhered to the position herein indicated:

"It has always been the rule of this office to give advice only in *actual* cases. * * * It is impossible to reply to mere speculative points or *supposed* cases." (9 Opin., 82.)

"It is not the duty of the Attorney-General to give an opinion on a question * * * with which the Government has no present concern." (9 Opin., 355.)

"The Attorney-General will not give an opinion on an important legal question when it is not practically presented by an *existing* case before a Department." (9 Opin., 421; 10 Opin., 50.)

"The opinion of the Attorney-General may be required on questions of law arising in the actual administration of a Department, but not upon hypothetical cases merely." (13 Opin., 531.)

"It is not the duty or practice of the Attorney-General to officially answer abstract or hypothetical questions of law." (13 Opin., 568.)

Later opinions fully harmonize with the above.

Permit me also to quote the following from 13 Opinions, 531, as giving a reason for the rule:

"You will readily perceive the inconvenience of giving upon a hypothetical case an opinion which, upon the consideration of an actual case, might require modification on account of circumstances not imagined, and therefore not considered in the preparation of the opinion."

To attempt in advance to settle such questions, in the words of another eminent Attorney-General, is "to anticipate trouble," (9 Opin., 421), and, it may well be added, to *promote* trouble.

The Solicitor of the Treasury doubtless had the statute and

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these opinions in mind at the time of penning the closing paragraph of his opinion, namely: "Whether or not you will desire to construe this statute upon a hypothetical case, is not for me to determine. The difficulties of so doing could not be better illustrated than by the case here presented."

In view of the foregoing I have no doubt you will readily perceive that it would be improper for this Department to give an opinion upon the question submitted.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CUSTOMS LAWS—CLASSIFICATION.

Advised, that the decision of the Treasury Department of April, 1871, holding that the article known as New Zealand flax is dutiable as flax not hackled or dressed, should be modified so as to classify the article for duty under the provision for sunn, sisal-grass, and other vegetable substances not specially enumerated or provided for.

DEPARTMENT OF JUSTICE,
June 18, 1889.

SIR: I have the honor to acknowledge receipt of your letter of June 12, 1889. It submits for my consideration, under section 2 of the act of March 3, 1875, "papers received from the ports of New York and Boston, relative to the classification of an article known as New Zealand flax," in which you say the article "would seem to be properly dutiable under the provisions for sunn, sisal-grass, and other vegetable substances, not specially enumerated or provided for in T. I. 333, act of March 3, 1873."

It also appears from the letter and the inclosures that this is "the classification considered applicable by the collectors and appraisers of the two ports above named." My attention is also called to the fact that your Department, by a decision in "April, 1871," held the article to be dutiable as flax not hackled or dressed, and that your Department is unable, owing to the provisions of section 2 of the act of March 3, 1875, to modify the above decision, and my views are asked as to whether such decision shall be continued in force or

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shall be modified in accordance with the views of the customs officers.

I am of the opinion that the above decision of 1871 should be modified so as to classify the article referred to as dutiable under the provisions of T. I. 333, act of March 3, 1883; and if you decide to modify said decision as indicated, I concur in such modification and recommend the same.

I return all the inclosures, as requested.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ARIZONA TERRITORY.

The act of the legislature of Arizona Territory, approved March 21, 1889, providing for the holding of a convention for the purpose of forming a State constitution to be submitted to the legal voters of the Territory for their approval or rejection, is not inconsistent with the organic act of the Territory or any other law of Congress, or with any provision of the Constitution, and is therefore valid.

Whether such legislation is "premature" is a question that addresses itself solely to the legislature that passed, the governor who approved, and to Congress which had the power finally to ratify or annul the measure.

DEPARTMENT OF JUSTICE,

June 19, 1889.

SIR: I have the honor to acknowledge receipt of your favor of the 16th of May, ultimo, inclosing a copy of a letter from the governor of Arizona, dated May 1, 1889, with papers, and requesting an opinion relative to the validity of an act "to provide for the holding of a convention for the purpose of framing a State constitution to be submitted to the people for their approval or rejection," passed by the last legislature of the Territory and approved by the then governor.

Such act provides for an election in said Territory of delegates to a convention to frame a State constitution to be submitted to the legal voters of the Territory for their approval or rejection; specifies the number of delegates to be chosen, and apportions them among the various counties; prescribes

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the qualifications of delegates and of the persons to vote; and provides the machinery of such election and the returns thereof. It also provides in a general way for the organization of the convention and the election of its officers; directs that the convention proceed to frame "*a form*" of a constitution for "*a*" State, which constitution shall be submitted to the voters of the Territory for ratification or rejection, with a provision as to a separate submission of any separate article; leaves with the convention the time for such submission, and in their discretion to provide for an election of officers at the same time; and provides for a return of the votes upon the constitution and candidates, if any are submitted. It requires the governor to issue a proclamation calling for the election of delegates, and subsequently to declare the result of the vote upon the adoption or rejection of the constitution. It provides also for the pay of the delegates and officers of the convention, and section 11 reads: "Nothing in this act contained shall be intended or construed as altering or repealing any election or other law of this Territory," except, etc. The act was approved March 21, 1889, by the then governor.

The question presented is whether the Territorial legislature of Arizona had the right to pass, and the governor to approve, the act submitted.

I am unable to find anything in the Constitution or in any statute which invalidates this legislation. The provisions of the organic act of this Territory are few (see 12 Stat., 664), and, upon examination, none of them will be found bearing restrictively upon this question, unless it be the clause in section 1, which provides that the Territorial "government shall be maintained and continued until such time as the people residing in said Territory shall, with the consent of Congress, form a State government * * * and apply for and obtain admission into the Union as a State," etc.

Now, what is there in the act submitted for examination that is in any way inconsistent with the above provisions? It in no way seeks to prevent the Territorial government "from being maintained and continued" just as long as the organic law provided it should be. This act does not propose to "form a State government." It is simply tentative and con-

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ditioned upon Congressional consent and admission. It contemplates entire submission to the fundamental law and to the maintenance of the Territorial government, until Congress shall consent to its forming a State government, and, indeed, until the Territory shall be admitted as a State. It declares that nothing in it "shall be intended or construed as altering or repealing *any* law of this Territory" (with an exception immaterial to this issue). "*A form*" of "*a*" constitution which shall be satisfactory to the people is what is sought to be obtained. All the steps which the act authorizes to be taken are of the same character. There is nothing in the act itself, or in the circumstances surrounding its inception, so far as appears from any papers or information furnished this Department, antagonistic to the Constitution or the organic act of Congress. It only provides for a peaceful method of formulating *proposals* for admission after submitting the same to the tribunal of a popular vote. It proposes simply to ascertain what kind of a constitution (and perhaps officers) would be acceptable to the people.

While there is nothing in any statute or in the Constitution expressly prohibitory, there are provisions of both which seem to authorize the legislation in question. The Revised Statutes provide that "the legislative power of every Territory shall extend to *all rightful subjects* of legislation *not inconsistent* with the Constitution and laws of the United States" (Rev. Stat., § 1851), and then specify certain subjects of restriction on this very general legislative power, as follows:

"No law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

Section 1860 enumerates other "restrictions on the power of the legislative assembly," namely, it can not enlarge the list of persons who can exercise the right of suffrage and hold office; it prohibits a denial of such right to a citizen on account of race, color, or previous condition of servitude; and provides that certain officers in the Army and Navy can not be authorized to vote nor be elected to or hold office or

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appointment in the Territory. So also section 1889 provides that the legislative assemblies of the several Territories shall not grant private charters or especial privileges, etc., and, in 1886 (24 Stat., 170), legislation upon a large number of additional subjects was prohibited. Now if Congress had desired to restrict the passage of any act relative to the formation of a State constitution without the authority of an enabling act, it would have been very easy during all these years, while making restrictions, to have added this one. The question of the power of a Territorial legislature to pass such an act had been a subject of discussion almost from the foundation of the Government, and if it was the legislative intent to restrict this power, it seems certain that such intent would have been expressed among the other restrictions.

But instead of so doing, Congress in terms conferred upon the legislatures the power to legislate upon "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Now, why is not this act within that power? It is not in conflict with Constitution, statute, or fundamental law. It is not within any of the many restrictions which Congress has seen fit to specify, and it would seem to be in relation to a subject upon which the people of a Territory, about to ask admission into the Union, ought to have the right to speak.

The Constitution guarantees to them the right of petition, and if they conceive themselves aggrieved in being deprived of the privileges of statehood, they can petition for the redress of such grievance. If so, why have they not the right to adopt any orderly method for obtaining a popular expression as to the *form* and the *terms* of such petition? Why is not this a rightful subject of legislation under this constitutional provision? In view of the precedents hereinafter cited, it is submitted that Congress, having so frequently accepted the results of such legislation and having so often admitted States coming with constitutions formed under similar acts, has given expression to its judgment that it is a rightful subject of legislation? (See *Clinton v. Englebrecht*, 13 Wall., 434, 444, 445.)

But Congress has further provided "that all laws passed by the legislative assembly and governor of any Territory

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* * * shall be submitted to Congress, and if disapproved shall be null and of no effect" (sec. 1850), thereby retaining power in itself to declare void any act of a Territorial legislature. Such a provision implies the validity of an act until it shall be so declared void; always, of course, assuming that it is not inconsistent with the organic act, a law of Congress, or the Constitution. And so the Supreme Court held in *Miners' Bank v. State of Iowa* (12 How.) that "though by the fundamental law of a Territory its legislation is to be subject to the disapproval of Congress, yet, till disapproved, it is valid and operative," etc. (See also *Smith v. Foster*, district court of Arizona, Judge Porter, in 1889.)

But the courts have held that Congress has not only the power to declare void, but unlimited power to *amend*, by reason of the relations existing between Congress and the Territories. It is declared in *National Bank v. Yankton* (101 U. S. R., 129-133) that "Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution. * * * Such a power [to amend the acts of Territorial legislatures] is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may legislate directly for the local government. It may make a void act of a Territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments." This doctrine is not novel, but it is more succinctly stated in this case, perhaps, than in any other.

The *precedents* also clearly justify such legislation. In many cases—perhaps generally—Congress has taken the initiative and passed an enabling act; but in many other cases the Territories took the initiative, and were admitted without enabling acts. Sometimes Congress has modified proposed constitutions before acceptance, and sometimes has accepted without modification. The Territorial legislature of Michigan passed an act providing for a convention to frame a constitution, although Congress passed no enabling act. Such

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convention framed a constitution ; provided for its submission to the people, who ratified it, and at the same time State officers were elected. Subsequently, Congress by act ratified what had been done upon condition that a change in boundary should be consented to. California was admitted without an enabling act, and, indeed, without having been organized as a Territory. Its constitution was framed by a convention called by proclamation of its military governor, and the convention elected State officers. Iowa, without an enabling act, provided by a Territorial act for a convention, which framed a constitution ; Congress ratified its action, only requiring consent to a change of boundaries. Florida also, without an enabling act, provided for a convention by act of its Territorial legislature, which framed a constitution, and Congress ratified it. Arkansas, without an enabling act, initiated proceedings to frame a constitution, and Congress ratified its act by admission. Oregon, without an enabling act, provided by act of the Territorial legislature for a convention, which framed a constitution and which was ratified at the popular election, and Congress admitted the State. In the cases of Vermont, Kentucky, Tennessee, and Maine, also, there were no enabling acts. Hence, impliedly at least, by Constitution, statute, judicial authority, and precedent, the legislative assembly had the right to pass the act, and in the absence of any specific restrictive provision to the contrary such right seems to be certain and unequivocal.

Besides, I am unable to perceive any good reason why the people of the Territory should not have the right to meet in convention, frame a proposed State constitution, and with it in hand petition Congress for admission to the Union. Whether such a convention shall come into life by voluntary assemblage, by the selection of delegates in the primary assemblies, or by and through a proper act of the Territorial legislature can not be material. The latter course would seem to be preferable, because it would throw around the proceedings the sanction and protection of official safeguards, and would be more certain than either of the others to secure a true expression of the popular will. If such act is surrounded by an atmosphere of entire loyalty to the Constitution and the laws, so long as Congress is the supreme and final arbiter as to all questions and propositions contained in it, it is diffi-

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cult to see how harm can come therefrom in any direction. It would seem to be the safest, most expressive, and highest form of petition. I do not see, therefore, how the act submitted is assailable on principle or authority.

I have not overlooked the opinion of this Department given in 1835. What was held in that opinion is that the Territorial legislature of Arkansas had no right to pass laws "*authorizing the formation of a constitution and State government*" (2 Opin., 728). That is not this case. But when, upon investigation, we find that within a year after such opinion was rendered the people of Arkansas held a convention, and did (to quote the language of the act of Congress, 5 Stat. L., 50) "*form for themselves a constitution and State Government*" without any enabling act, and that Congress thereon admitted the State, we find a *legislative* opinion not in entire harmony with the other. And since 1835 much has been done in the same direction in the way of statute, precedent, and judicial decision, as we have seen. So far, therefore, as the opinion may be construed as antagonistic to the views herein expressed, *if at all*, I can only say that it does not commend itself to my judgment.

As to the suggestions made by the governor that the enacting clause does not allude to the provision in the body of the act as to the election of State officers, I would say that while such an objection would be good under some State constitutions, I know of no law applicable to this case that is therein violated. (See Cooley Const. Lim., 170 *et seq.*, 5th ed.)

With the question as to whether this is unwise or "premature" legislation, this Department has nothing to do. That question addresses itself solely to the legislative assembly that passed, the governor that approved, and to Congress which had the power, finally, to ratify or annul the measure.

Trusting I have been sufficiently explicit, I am, very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

National Bank in Indian Territory.

NATIONAL BANK IN INDIAN TERRITORY.

Upon consideration of the effect of certain provisions in treaties with the Creek Nation of Indians of August 28, 1856, and August 11, 1866, which render inoperative in the Creek territory the various national banking laws: *Advised* that a national bank can not lawfully be established at Muscogee, a town in the territory of that nation.

DEPARTMENT OF JUSTICE,
June 24, 1889.

SIR: The question upon which an opinion is asked in your communication of May 23 ultimo is, whether a national bank could be established lawfully in that part of the Indian Territory "lying within the jurisdiction of the Union Agency (at Muscogee), which extends over the country occupied by the five civilized tribes, viz, the Cherokees, Creeks, Seminoles, Choctaws, and Chickasaws, provided the directors shall be citizens of the United States." But as these names represent so many different nations or communities, and as the application which has given rise to the questions submitted is for authority to organize a national bank at Muscogee, a town in the territory of the Creek Nation, I shall limit myself to the question thus narrowed, and as the one *actually arising* in the administration of the Treasury Department. (See sec. 356, Rev. Stat.)

The objections to entertaining favorably this application to establish a national bank at Muscogee appear to me to be insurmountable.

These objections grow out of the treaties now in force between the United States and the Creek Nation.

Article 15 of the treaty of August 28, 1856, provides as follows:

"So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons, not being members of either tribe, found within their limits, shall be considered intruders, and be re-

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moved from and kept out of the same by the United States agents for said tribes, respectively (assisted, if necessary, by the military), with the following exceptions, viz, such individuals, with their families, as may be in the employ of the Government of the United States; all persons peaceably traveling or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States, and such persons as may be permitted by the Creeks and Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits without becoming members of either of said tribes." (Rev. Treat., p. 111.)

Article 10 of the treaty of August 11, 1866, provides as follows:

"The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: *Provided, however, (that) said legislation shall not in any manner interfere with or annul their present tribal organizations, rights, laws, privileges, and customs.*

"The Creeks also agree that a general council consisting of delegates elected by each nation or tribe lawfully resident within the Indian Territory may be annually convened in said Territory, which council shall be organized in such manner and possess such powers as are hereinafter described." (*Ibid.*, p. 119.)

To these may be added article 4 of the above-cited treaty of August 28, 1856, which is as follows:

"The United States do solemnly agree and bind themselves that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within or annexed to *any Territory or State*, nor shall either, or any part of either, *ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.*"

The effect of these provisions would seem to be to invest the Creek Nation with the right of self-government, to the extent, certainly, of making it entirely safe to say that the

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various national banking laws are not in operation in the Creek Territory, and could only be in operation there by enactment by the legislative authority of that nation. The national banking laws do not fall within any of those descriptions of legislation by Congress which it is stipulated shall be in force in the Creek territory.

The right of the Creek Nation to govern itself, so carefully guarded and protected by these treaties, is a right founded on a consideration of great value, moving directly from the Creek Nation to the United States, and the faith of the latter is pledged for the protection of the Creeks in all the rights secured to them by the treaties mentioned.

To say that Congress, by making it lawful to establish a national bank in a "territory" (section 5134 Revised Statutes), meant to override these solemn treaty obligations, by implication merely, is a position that can not be acquiesced in for a moment. (*Chew Heong v. United States*, 112 U. S., p. 536, and cases there cited.)

It follows, then, necessarily, that a national bank can not be established in Muscogee or any other place where the national banking laws can not have effect as laws of the United States.

Without expressing any opinion on the subject, I may add, that it will probably be found to be the case that what has been said with reference to the Creeks holds good as to the other four tribes mentioned in your communication.

I have the honor to be, sir, your obedient servant,
W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

COMPROMISE OF JUDGMENT.

Where a judgment was recovered by the United States against a corporation in a suit for a penalty for violation of the provisions of the act of February 26, 1885, chapter 164, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," etc.: *Advised*, that it is extremely doubtful whether the power given to the Secretary of the Treasury by section 3469, Revised Statutes, to compromise "any claim," extends to a judgment such as the above—*i. e.*, for a fine, penalty, or forfeiture.

Compromise of Judgment.

DEPARTMENT OF JUSTICE,
June 27, 1889.

SIR: Your communication of 16th April, ultimo, submits for opinion the question whether you have to entertain the proposition of the Church of the Holy Trinity, a religious corporation of the State of New York, to compromise a judgment of \$1,041.25, recovered against that corporation by the United States in the circuit court of the United States for the southern district of New York, the amount recovered being the penalty of \$1,000, with the addition of costs, for violating the act of February 26, 1885 (23 Stat., 332), entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," by importing from England a clergyman to act as pastor of the church owned by the defendant corporation.

If the power to make the proposed compromise resides in the Secretary of the Treasury, it must be by virtue of section 3469, Revised Statutes, which is in the following words:

"Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws."

I say that any power the Secretary may have in the matter must be referred to section 3469, because an attempt has been made to bring the case within section 5292, Revised Statutes, by taking the steps therein prescribed.

Looking now at the language of section 3469, it may be said that although the word "claim" therein used may embrace a judgment in favor of the United States for the amount of a fine, when taken in a very extended sense, it does not follow, necessarily, that it has so large a meaning in the present instance; for it may appear from the context, or in

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some other proper way, that Congress must have intended to use it in a more restricted acceptation, as the Supreme Court held was the case with this same word as used in section 3477, Revised Statutes (see *Bailey v. United States*, 109 U. S., 437, and cases cited), the court being of opinion that "claim," as used in the section last mentioned, only meant any *unliquidated* claim against the Government, and "that the statutes in question are not to be interpreted according to the literal acceptation of the words used."

The language of section 3469 does not seem, in some particulars, to be that which the legislature would have chosen if it had had the purpose to extend the law to fines. Thus, without stopping to criticize the use of "claim" to cover the right to a fine, or a penalty, or a forfeiture, the section requires "a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing *in detail the condition of such claim*," etc. Now, the requirement that the report shall show "*in detail the condition of such claim*" would seem hardly to apply to a fine incurred which is a fixed definite sum of money, admitting of no detail and requiring no explanation.

It may be that no important inference can be drawn from the improbability of the use by Congress of inappropriate language alone, but, at the same time, it must be admitted that such a consideration may be important in connection with other considerations, all pointing in the same direction.

Equally, if not more, inappropriate was it to authorize the Secretary of the Treasury "to compromise" fines, if it was intended that they should come under the words "*any claim*." By compromise we understand that *each* party to a transaction gives up something, and that there are opposing views as to the amount legally demandable. But in the case of a fine there is no room for compromise, because the party held for the fine has no right whatever to ask an abatement of the full penalty. If any abatement is made by the proper authority, it is not because the party benefited has a right, or even an equity, to it, but it is on the public consideration that in the particular case the penalty for the violation of the law happens to be disproportionately heavy, and calls for mitigation, in order to prevent impairment by too much

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severity of the general moral effect of the administration of the laws for the prevention of offenses.

But compromise is an inappropriate word for still another reason. It does not involve the power to release or relinquish the entire demand, which it is important the Secretary of the Treasury should be invested with authority to do to meet cases occasionally happening, and which he is empowered to do by section 5292, Revised Statutes, authorizing him to *mitigate* and *remit* any fine, penalty, forfeiture, or disability "under the customs and navigation laws."

These considerations suggested the advisability of an examination of the various laws which Congress has passed from the foundation of the present National Government down, giving the Secretary of the Treasury power to abate or entirely forgive penalties or forfeitures, references to all which laws will be found in Mr. Justice Harlan's opinion in the case of the *Laura* (114 U. S. R., 415), and the result of the examination is that, up to the enactment of the Revised Statutes, which took effect as of the 1st of December, 1873, there is not a single instance in that legislation in which Congress has conferred the power to *compromise*, but, without an exception, the power conferred has been "*to mitigate or remit*," and, as was to be expected, the same words are used in the Revised Statutes (section 5292) to invest the Secretary of the Treasury with the authority to abate or forgive fines, forfeitures, or penalties.

But the inappropriateness of the verb *compromise*, in the view of Congress, to convey this power over fines, penalties, or forfeitures is strikingly shown by the third section of the act of March 3, 1851 (9 Stat., 593), which provides "that in all cases of fine, penalty, forfeiture, or disability, or *alleged liability*, for any sum or sums of money by way of damages or otherwise, under any provision of law relating to the Post-Office Department, * * * the said Auditor shall have power, with the written consent of the Postmaster-General, to *mitigate or remit* such penalty or forfeiture, remove such disability, and to *compromise, release, and discharge such claims for such sum or sums of money and damages*, on such terms as the said Auditor shall deem just and expedient; and that in all cases where a judgment shall have been obtained for a *debt or dam-*

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*ages * * * to compromise such judgment and accept in satisfaction thereof less than the amount of such judgment: Provided, That the power conferred by this section shall not extend to any case of fine, penalty, forfeiture, disability, alleged liability, or claim which shall be incurred, accrue, or arise subsequent to the passage of this act, or to any judgment obtained after the passage thereof."* The same attentiveness to the proper use of the word *compromise* is shown in section 316 of the act of June 8, 1872 (17 Stat., 325), which also relates to the Post-Office Department, in the very words of the act of 1851 (*supra*).

Looking at the entire line of legislation giving the Secretary of the Treasury power over fines, penalties, and forfeitures, from the beginning to the present time, we discover a single instance only in which Congress has used the word *compromise* to convey to the Secretary of the Treasury the power to remit or mitigate fines, penalties, and forfeitures, and that instance occurs in section 19 of the act of June 22, 1874 (18 Stat., 190), where the customs officers are forbidden "to compromise or abate any *claim*" for "any fine, penalty, or forfeiture," and any such attempt "to make such compromise or abatement, or in any manner relieve or attempt to relieve from such fine, penalty, or forfeiture," is declared a felony: "*Provided, however, That the Secretary of the Treasury shall have power to remit any fines, penalties, or forfeitures, or to compromise the same in accordance with existing law.*"

It is noticeable, furthermore, that the next section (sec. 20) of this act prescribes certain steps to be taken when application is made "for the *mitigation or remission* of any fine, penalty, or forfeiture, or the refund of any duties," dropping the word *compromise* altogether.

It is significant, although not conclusive, that a title of the Revised Statutes (LXVIII) is exclusively devoted to the subject of "remission of fines, penalties, and forfeitures;" that by this title the Secretary of the Treasury is invested with the power to "mitigate or remit" or simply "to remit," but not once to compromise fines, penalties, and forfeitures; that section 3469 does not belong to this title, but to title XXXVI, which relates to "*Debts due by or to the United States,*" and that title LXVIII covers the whole subject of the mitigation

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and remission of fines, penalties, and forfeitures under the revenue and navigation laws.

Unless, therefore, the fact that the demand for the fine has passed into judgment, and in that way undergone some fundamental change in its character—a point to be next considered—it seems to me to follow from what has been stated that it is, to say the least, extremely doubtful whether Congress intended to include *fines* by the words "*any claim*" in section 3469.

In *United States v. Morris* (10 Wheat., 246) it was held that the power of the Secretary of the Treasury to remit forfeitures was not defeated by the fact that a judgment for the value of the property forfeited was rendered before the Secretary's act of remission, although the effect of the remission would be to destroy the claim of the collector and surveyor to a moiety of the judgment.

This power of remission being founded on *public considerations*, it was wisely held that those considerations were as applicable after condemnation or judgment as before.

The case of *Wisconsin v. Pelican Insurance Company* (127 U. S. R., 265) was an action brought in the Supreme Court of the United States by the State of Wisconsin on a judgment rendered by a court of that State against the Pelican Insurance Company, of New Orleans, La., the amount of the said judgment representing certain fines and forfeitures which the Pelican Insurance Company had incurred in consequence of its failure to obey certain statutory regulations of the State of Wisconsin, and, it being objected that the cause of action was criminal and not civil in character, and so without the jurisdiction of the court, the court looked beyond the judgment of the State courts, and, finding the objection to its jurisdiction well founded, refused to entertain the suit further.

If, then, the Supreme Court thought it proper to go outside the judgment of condemnation in *United States v. Morris* (*supra*) for the purpose of maintaining the power of the Secretary of the Treasury to remit penalties and forfeitures, and in *Wisconsin v. Pelican Insurance Company* (*supra*) to go into the facts on which the judgment sued on was founded in order to protect itself against an abuse of its jurisdiction, it seems to me to be entirely proper in the matter before me

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to make a similar inquiry into the premises on which the judgment rests, in order to prevent a subject which there is reason to think does not come under section 3469 from being brought within that section for some such technical reason as that the judgment against the Church of the Holy Trinity is a novation of the original right to the fine sued for. In a word, I am doing with reference to the authority of the Secretary of the Treasury under that section precisely what the Supreme Court did in *Wisconsin v. Pelican Insurance Company (supra)* with reference to its original jurisdiction. Indeed, if in *United States v. Morris (supra)* it was held proper to go behind the judgment of condemnation to support the power of the Secretary as to penalties and forfeitures, it would seem, by a parity of reasoning, to be equally proper to do the same thing in the matter in hand, to prevent what might perhaps be a misuse of the Secretary's power under section 3469 to compromise "any claim in favor of the United States."

My opinion, therefore, is that it is extremely doubtful whether the power to compromise given in section 3469 extends to the case of a fine; and I am confirmed in this view by the consideration that there is, as already stated, another section in the Revised Statutes (sec. 5292) which invests the Secretary of the Treasury with ample power to mitigate or remit all fines growing out of infractions of the revenue and navigation laws.

I have the honor to be, sir, your obedient servant,
W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

RESIGNATION OF NAVAL CADETS.

Where a naval cadet tendered his resignation, and it was accepted by the Secretary of the Navy and the cadet duly notified thereof, but in a short time (about two weeks) afterwards the cadet made application to withdraw his resignation, which was granted by the Secretary, who at the same time instructed him to report to the Superintendent of the Academy: Held that by the resignation and its acceptance the relations of the cadet with the Naval Academy were completely severed and his position there became vacant; that he could not be reinstated otherwise than by an appointment in conformity to sections 1514 and 1515, Revised Statutes; and that the action of the Secretary in permitting the withdrawal of the resignation after its acceptance had no legal effect whatever.

Resignation of Naval Cadets.

DEPARTMENT OF JUSTICE,

July 8, 1889.

SIR: It appears by your communication of 18th May, ultimo, that on December 13, 1888, a naval cadet at the United States Naval Academy, of the fourth class, tendered his resignation as a naval cadet with the consent of his parents. The resignation was accepted by the Secretary of the Navy on the 17th of the same month of December, to take effect as of that date. On the 3d of January, 1889, this cadet requested permission to withdraw his resignation, and on the 5th of the same month the Secretary of the Navy informed him that his resignation was regarded as withdrawn, and at the same time instructed him to report to the Superintendent of the Naval Academy.

Upon this state of facts the following questions are submitted by you for an opinion:

"(1) Whether the tender by such naval cadet of his resignation and its acceptance by the Secretary of the Navy, and the notification thereof to the cadet, created a vacancy in the Congressional district from which such cadet was appointed; and, if so, whether such vacancy could be filled in any other manner than as provided in section 1514 of the Revised Statutes?

"(2) Whether, such cadet having tendered his resignation and the same having been accepted by the Secretary of the Navy and the cadet notified of such acceptance, it was within the power of the Secretary of the Navy to revoke his order of acceptance of the resignation as tendered, and thereby to reinstate and restore such cadet to the Academy?"

If the cadet received his appointment from the Secretary of the Navy in pursuance of law, there would seem to be little room for question that the Secretary had authority to create a vacancy by accepting his resignation. The power to accept a resignation, like the power to remove from office, is deduced from the power to appoint, and is as firmly established as the power to remove. In this case is the Secretary of the Navy the appointing power?

Sections 1513, 1514, and 1515 of the Revised Statutes are in the following words:

"SEC. 1513. There shall be allowed at said Academy one

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cadet midshipman for every Member or Delegate of the House of Representatives, one for the District of Columbia, and ten appointed annually at large.

"SEC. 1514. The Secretary of the Navy shall, as soon after the 5th of March in each year as possible, notify in writing each Member and Delegate of the House of Representatives of any vacancy that may exist in his district. The nomination of a candidate to fill said vacancy shall be made upon the recommendation of the Member or Delegate, if such recommendation is made by the first day of July of that year; but if it is not made by that time, the Secretary of the Navy shall fill the vacancy. The candidate allowed for the District of Columbia and all the candidates appointed at large shall be appointed by the President.

"SEC. 1515. All candidates for admission into the Academy shall be examined according to such regulations and at such stated times as the Secretary of the Navy *may* prescribe. Candidates rejected at such examinations shall not have the privilege of another examination for admission to the same class, unless recommended by the board of examiners."

According to these provisions the following steps are necessary to the appointment of naval cadets: that is to say, each one, according as he resides in a State or Territory, must, except as to eleven of them, be recommended by a Member or Delegate of the House of Representatives from the Congressional district or Territory of which the proposed cadet is a resident, and upon such recommendation he must be nominated to fill a vacancy in the Academy, or in the case of a failure by a Member or Delegate to make such recommendation "the Secretary of the Navy shall fill the vacancy," and in the eleven excepted cases the persons to fill vacancies "shall be *selected* by the President." In other words, the Member or Delegate in the one case recommends, and the President, in the other, *selects*, but neither *appoints* the naval cadet.

The "nomination," based on the "recommendation" or the "selection," is made to the Naval Academy or to the examining committee selected from the Academic Board of the Academy by the Superintendent of the Academy under paragraph 37 of the regulations of the Secretary of the Navy for

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the government of the Academy. As section 1515 provides, "all candidates for admission into the Academy shall be examined according to such regulations and at such stated times as the Secretary of the Navy may prescribe." It is, therefore, only by virtue of regulations made by the Secretary of the Navy, and carried into effect by officers immediately or meditately detailed or appointed by him, that a candidate is admitted to the Academy. Indeed, not an important step can be taken looking to the admission of a candidate without the express approval of the Secretary of the Navy, saving, perhaps, the election and findings of the committees appointed to conduct the mental and physical examinations of candidates.

From this it would seem to follow, necessarily, that admission or appointment to the Naval Academy is the act of the Secretary of the Navy, and hence that the acceptance by him of the resignation of the cadet in question created a vacancy in the Academy.

It is to be observed, furthermore, that while the law says that a candidate must have undergone a successful examination and possess certain other qualifications before he can be admitted to the Academy, it does not say that a candidate possessing those qualifications *must* be admitted. Where a candidate had passed successfully the graduating examination, as the law stood before the act of August 5, 1882 (*supra*), it was made the *duty* of the Secretary to appoint him a midshipman (section 1521, Rev. Stat.), and, as the law now stands under that statute, it is the *duty* of the Secretary to make so many appointments from the graduating class as may be necessary to fill vacancies in the line of the Engineer and Marine Corps. By this difference of language great support is given to the conclusion that it is by the act and permission of the Secretary alone that a candidate having all the qualifications is admitted to the Academy.

This, I believe, answers the first question.

The second question I have less difficulty in answering. The cadet having declared his purpose to resign, and the Secretary of the Navy having signified his acquiescence in that purpose, the result was a complete severance of the cadet's connection with the Academy and as much a vacancy

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there as if the cadet had died. The consent of the parties to the act of resignation could not be recalled except by the re-appointment of the same person as cadet in conformity to sections 1514 and 1515, Revised Statutes. I need only refer, in support of this proposition, to the opinion of the Supreme Court in *Mimmack v. United States* (97 U. S., 436, 437); *United States v. Corson* (114 U. S., 619).

It follows, then, that the attempted consent of the Secretary of the Navy to the withdrawal of the cadet's resignation, after acceptance thereof, had no legal effect whatever.

I have the honor to be, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

COMPENSATION OF UNITED STATES ATTORNEY AT NEW YORK.

When the United States attorney at New York appears in the cases mentioned in section 827 Revised Statutes, by direction of the Secretary or Solicitor of the Treasury, a proper and reasonable allowance for his services in such cases may be made to him by the Secretary of the Treasury under that section.

The allowance so made under section 827 is in addition to the annual salary provided by section 770, Revised Statutes, for the ordinary official services of the district attorney.

DEPARTMENT OF JUSTICE,

July 8, 1889.

SIR: I received your letter of June 6, 1889, containing, with other inclosures, the Department's circular of December 2^d, 1887 (No. 143), in which you ask for "an expression of my views as to whether the Secretary of the Treasury is authorized to make any allowance to the United States attorney at New York" for "services in suits brought against collectors of customs for the recovery of alleged excessive duties on imported merchandise," etc., under "section 827 of the Revised statutes."

I have also to thank you for your letter of July 1, 1889 (in response to mine of June 27), containing the Department circular of June 4, 1877 (No. 71), and also containing the additional information that the items in question arose in cases where the United States attorney appeared in behalf

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of the collector of customs "by *direction* of the Secretary of the Treasury;" and also "that from the date of said circular of June 4, 1877, until the date of the circular of December 24, 1877, it was the practice to allow the United States attorney at New York, whenever it appeared that he had earned the amount in customs suits, the sum of \$4,000 a year, under said section 827; * * * and that since the date of the last mentioned circular it has been the practice to allow the United States attorney at New York such sum for services rendered in those suits certified by the court to be correct which are approved by the Secretary of the Treasury."

In reply I respectfully submit the following:

Section 770, Revised Statutes, provides that "The district attorney for the southern district of New York is entitled to receive quarterly, for all his services, a salary at the rate of six thousand dollars a year." * * * The words "for all his services" refer to his ordinary personal services as district attorney, such as are indicated in the next section, in which it is provided, among other things, that "It shall be the duty of every district attorney, * * * unless otherwise instructed by the Secretary of the Treasury," to appear in behalf of the officers and in the proceedings therein mentioned. For all such services during the year this six thousand dollars is made full payment.

But section 827 provides that "*when* a district attorney appears by *direction* of the Secretary or Solicitor of the Treasury in behalf of" the same officers in similar proceedings "he shall receive such compensation as may be certified to be proper by the court in which the suit is brought and approved by the Secretary of the Treasury."

The question is, whether this compensation, under section 827, is in addition to the \$6,000 mentioned in section 770.

The duties contemplated under section 827 are apparently beyond or outside of those mentioned in section 771, because they are limited to the cases where he appears "by *direction* of the Secretary or Solicitor of the Treasury." This seems to assume that there are cases where the Secretary or Solicitor may desire for some reason to give special directions, perhaps

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for the performance of extraordinary or unusual services. However this may be, section 827 plainly indicates a legislative intent, by its limitations, specifications, and different methods of auditing, to prescribe other and additional compensation for services rendered under the immediate direction of the Secretary or Solicitor.

The argument under section 770 is that the \$6,000 is given for *all* his services, and hence he is entitled to no additional compensation for any services whatever. But there are well-recognized exceptions, which certainly have no firmer ground to stand upon than has this one. For example, by section 825 he is entitled to receive "2 per cent. upon all moneys" collected in the suits therein referred to (7 Benedict, 405), as additional compensation. Moreover, although by section 833 "*every district attorney*" is required to "make to the Attorney-General" semi-annual returns of fees received by him, yet, under section 834 "the fees and compensation allowed district attorneys by sections eight hundred and twenty-five and *eight hundred and twenty-seven*" are expressly excepted from the provisions of section 833. Besides, it has been for many years the rule of this and of the Treasury Department to permit the district attorney of southern New York to retain such 2 per cent. given him under section 825 without return or question (11 Opin., 88). Again, by looking at section 4646 we see that the district attorney is given "a just and suitable compensation for his respective services in each prize case to be adjusted and determined by the court." This was held by this Department in 1864 to be allowable, even though above the \$6,000 given by a statute differing but slightly from section 770 (11 Opin., 79). If in these two cases, under section 825 and section 4646, the district attorney at New York is entitled to receive compensation in addition to his \$6,000, no possible argument can be made stronger than in those cases for his not receiving the additional compensation in the cases specified in section 827.

The opinion above indicated is strengthened, if we note the *order* in which these various provisions were originally enacted, and likewise the order in which they stand in the Revised Statutes (15 Opin., 492). The latter sections seem .

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to have been intended to create specific exceptions to the general phraseology of the former. (14 Opin., 573.)

This construction finds ample justification in the uniform practice of the Treasury Department, at least since June 4, 1877. Indeed, it is plainly announced in the Department circular No. 71 of that date, and also in the Department circular No. 143, under date of December 24, 1887. I do not see how, in the face of these circulars, and of such uniform practice for so many years, any other interpretation can now be given to the statutes, whatever might be said if the question were an original one. (*United States v. Hill*, 120 U. S., 169-180; *Hahn v. United States*, 107 U. S., 402-406, and cases cited.)

In addition to the authorities above referred to, permit me to call your attention to 9 Opin., 146; and *McCulloch's Case*, 6 First Comptroller's Decisions, 36.

My opinion is that, in the cases mentioned in section 827 in which the United States attorney at New York appears by "direction of the Secretary or Solicitor of the Treasury," the Secretary of the Treasury is authorized to make proper and reasonable allowance to him for his services under such section. The amount is always within control, because such amount must be certified to be proper by the court in which the suit is brought, and must be approved by the Secretary of the Treasury. The Secretary has the right, under sections 827 and 846, to scrutinize, reverse, and cut down all charges under that section. (15 Opin., 277.)

The inclosures are herewith returned as requested.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved :

W. H. H. MILLER.

Surplus Graduates of the Naval Academy.

SURPLUS GRADUATES OF THE NAVAL ACADEMY.

Where certain members of the graduating class at the Naval Academy were reported as physically disqualified for the naval service, but as mentally and professionally qualified, and were placed among the "surplus graduates:" Advised that under the acts of August 5, 1882, chapter 391, and March 2, 1889, chapter 396, they were each entitled as such surplus graduates to a certificate of graduation, an honorable discharge, and one year's pay, and that there is no authority in the law for stating in such certificate the physical disqualification of the graduate.

DEPARTMENT OF JUSTICE,

July 9, 1889.

SIR: By your communication of July 2, instant, it appears that in the class of naval cadets that was graduated at the Naval Academy in June last there were three who were reported as "physically disqualified for the naval service," but as "mentally and professionally qualified."

Assuming that the imputed physical disqualification of these cadets exists, the questions presented for opinion are, (1) whether these three cadets, who are physically unfit for the service, are entitled to certificates of graduation and honorable discharges with one year's sea pay, or shall be simply dropped from the service; and (2) if such certificates and discharges may be given, whether they should contain, respectively, the statement that the cadet named therein is physically disqualified for the service.

Under the acts of August 5, 1882 (22 Stat., 285), and March 2, 1889 (25 Stat., 878), it is provided that if, after filling existing vacancies in the Navy and in the Marine and Engineer Corps from the graduating class of the Academy for any year, there shall be "a surplus of graduates," to each of them "shall be given a certificate of graduation, an honorable discharge, and one year's sea pay, as now provided by law for cadet midshipmen."

As the cadets in question are, as your letter indicates, "surplus graduates," whatever may be their physical condition and whatever may be the reason they did not receive appointments in the service, I am clearly of opinion they are entitled to the certificate of graduation, an honorable discharge, and one year's sea pay.

Accrued Pension.

Being entitled to these three things as "*surplus graduates*," I do not think there is any authority in the law for stating their physical disqualification in the certificates to be given them, for the reason that physical condition does not enter into the idea of graduation, except in so far as graduation presupposes a sound physical condition at the time of admission to the Academy. Such a statement would be objectionable as out of place, which is alone a good reason for omitting it.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

ACCRUED PENSION.

The *proviso* in the act of March 1, 1889, chapter 332, authorizing payment to a deceased pensioner's legal representatives, in certain contingencies, of the accrued pension due on his pension certificate at the time of his death, is to be construed as applicable to all outstanding pension certificates, whether issued before or since the passage of the act. But the pensioner must have died since the passage of that act to entitle his legal representatives to claim such accrued pension.

DEPARTMENT OF JUSTICE,

July 12, 1889.

SIR: Your communication of the 5th June, ultimo, submits for opinion a proviso of the act of March 1, 1889, entitled "An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and ninety, and for other purposes" (25 Stat., 782), which said proviso is in the following words:

"*Provided further*, That hereafter whenever a pension certificate shall have been issued and the pensioner mentioned therein dies before payment shall have been made, leaving no widow and no surviving minor children, the accrued pension due on said certificate to the date of the death of such pensioner may, in the discretion of the Secretary of the Interior, be paid to the legal representatives of said pensioner."

A question has arisen upon this provision as to whether it applies to all outstanding pension certificates, or only to

Accrued Pension.

those that have been issued since the passage of the act and that may hereafter from time to time be issued.

If, prior to this statute, a pensioner died without leaving a widow or a minor child or children, the accrued pension due on the pensioner's certificate up to the date of his death was not demandable by his legal representatives, and this was lost to creditors and others entitled to share in his estate. It is evident that legislation of this kind is in furtherance of natural equity, and of a highly beneficial character.

Now, it seems to me, that the case of a pensioner whose certificate was issued before the passage of the act is as much within the mischief sought to be avoided as that of a pensioner whose certificate was issued since the act went into effect, and it is more than probable that if Congress had intended to restrict the law to the latter cases it would have said "that whenever hereafter a pension certificate shall have been issued," and not "that hereafter whenever a pension certificate shall have been issued."

Supposing, however, that the meaning is doubtful, as may well be said in view of the difference of opinion between two high officers as to the scope of the proviso which you bring to my notice, it seems to me quite proper to give the largest operation to the proviso that can be given without doing violence to its language, or, as Mr. Wilberforce says, speaking of remedial statutes, where the words are open to doubt they are to receive a construction which will advance the objects of the act. (Wilb. on Stat., p. 235.)

Another question that has arisen is as to whether a pensioner must have died since the proviso was enacted to entitle his legal representatives to claim the amount of pension that had accrued at the time of his death.

This question must be answered in the affirmative, for otherwise the word "hereafter" would be consigned to silence, in violation of the rule that every word of a statute must, if possible, have some meaning attached to it. We have said that Congress by the use of "*hereafter*" had no reference to the time when a pension certificate was issued. It follows, then, that Congress must have intended by that word, if it was to have any effect at all, that the benefit of the proviso could only be extended to cases where the pensioner died after the

Device on Government Fire-Arms.

proviso went into operation. Indeed, the use of the present tense "*dies*"—namely, "that hereafter, whenever a pension certificate shall have been issued and the pensioner mentioned therein dies," etc.—prevents the proviso from being applied to cases where pensioners had died when the law took effect. This use of the present tense in connection with certain adverbs of time to denote futurity, as in the expression "when he arrives I will send for you," is not peculiar to the English language, and is so common, that we must suppose that Congress meant by the use of the present tense "*dies*" in connection with "*whenever*" precisely what would be conveyed thereby in common speech.

As your communication refers me to the papers accompanying it for the questions you desire to submit, and as I may have failed to gather exactly what those questions are, you will please inform me if this opinion does not cover everything submitted.

I have the honor to be, sir, your obedient servant,
W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

DEVICE ON GOVERNMENT FIRE-ARMS.

Sembler that the United States, having first appropriated the device of an eagle, with the letters U. S. under it, for the purpose of marking fire-arms manufactured by the Government, may prevent any private manufacturer using the same device on fire-arms manufactured by him, and thus falsely representing to the world that his fire-arms were made by the United States.

DEPARTMENT OF JUSTICE,
July 12, 1889.

SIR: In reply to the communication of your predecessor to this Department of the 26th of February, 1889, I have to say that whether the United States can be the proprietor of a trade-mark need not be considered, as it is clear enough that the United States, having appropriated to itself the device of an eagle, with the letters U. S. under it, for the purpose of indicating that fire-arms on which that device is stamped have been manufactured by the United States, has

KANSAS FIVE PER CENT. FUND—PAYMENT OF.

a right to prevent any private manufacturer using the same device on fire-arms manufactured by him, and thereby falsely representing to the world that his fire-arms were made by the United States. This is precisely what the Whitney Arms Company is doing, and doing so aggressively as to give uneasiness to persons in foreign parts who have made large purchases of arms from the United States stamped with the device in question, by threatening them with a suit for infringing what is claimed to be the trade-mark of that company.

It seems to me that, in view of the frequent occasions the United States have to sell old fire-arms to make way for improved ones, it would be advisable for the United States to apply to the proper court for an injunction to restrain the Whitney Arms Company from using the said device and thereby causing the United States great and irreparable damage.

It seems not improper for me to suggest that Congress should be asked to pass a law making it an offense to use in connection with anything any mark or device lawfully used and employed by the United States in connection with the same thing.

I am, sir, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF WAR.

KANSAS FIVE PER CENT. FUND—PAYMENT OF.

The provision in the act of March 2, 1889, chapter 410, for payment to the State of Kansas of \$43,790.32 on account of 5 per centum fund arising from the sale of public lands in said State, precludes all inquiry on the part of the accounting officers of the Treasury as to the legality and justness of the claim. It is their duty to allow and certify the claim for that amount, "as per decision of the First Comptroller of the Treasury of date May 6, 1880, and as stated by the Commissioner of the General Land Office."

DEPARTMENT OF JUSTICE,

July 13, 1889.

SIR: I have received the letter of the First Comptroller, under date of July 1, 1889 (with inclosures), with your in-

Kansas Five Per Cent. Fund—Payment of.

dorsement thereon of July 2 requesting my opinion upon the question submitted in his letter.

The question is, "In your opinion do you regard said appropriation mandatory upon the Comptroller to allow and certify said claim for payment, without further regard to the legality and justness of the same?"

The "appropriation" above referred to is found in the deficiency act of March 2, 1889 (25 Stat. 921), and reads as follows:

"For payment to the State of Kansas, on account of five per centum fund arising from the sale of public lands in said State from July first, eighteen hundred and eighty-four, to June thirtieth, eighteen hundred and eighty-five, as per decision of the First Comptroller of the Treasury of date May sixth, eighteen hundred and eighty, and as stated by the Commissioner of the General Land Office, forty-three thousand seven hundred and ninety dollars and thirty-two cents."

This provision clearly appropriates \$43,790.32 "for payment to the State of Kansas on account of 5 per centum fund arising from the sale of public lands in said State, * * * as per decision of the First Comptroller * * * and as stated by the Commissioner of the General Land Office."

Under this language it does not seem necessary to go back over the previous history of how this "5 per centum fund" originated, or as to its "legality and justness," or to look at previous opinions and decisions. Congress having seen fit to make the appropriation, and having the right to make it, out of "any money in the Treasury not otherwise appropriated," has shut the door against all such inquiries. The only questions under the language of the appropriation seem to be, (1) What was the decision of the First Comptroller? and (2) How was the account stated by the Commissioner of the General Land Office?

Looking at the latter question first, it is fair and proper to assume that the Commissioner of the General Land Office (being a public officer connected with one of the chief Executive Departments of the Government) stated the account then as he presented it to your Department under date of June 15, 1889, and as shown in the First Comptroller's letter, submitted. It will be noticed that the account is precisely

KANSAS FIVE PER CENT. FUND-PAYMENT OF.

the same, and for the same per centum upon sales, between exactly the same dates as are mentioned in the appropriation. The account is also stated from "the sales of lands within the limits heretofore embraced in certain *Indian reservations*," so that, presumably, and almost inevitably, Congress had this account thus stated before it at the time of making this appropriation.

Now, all that remains is to see what was the "decision of the First Comptroller of the Treasury, of date May 6, 1880," on the question of the payment to the State of Kansas on account of the "fund arising from the sale of public lands in said state." The following extracts from his opinion will clearly show how the question came up, what his decision was, its bearing upon the question submitted, and the very marked significance of the words "as per decision of the First Comptroller" contained in the appropriation:

"The State of Kansas has presented a claim against the United States amounting to \$90,566.08, being for 5 per cent. on the net proceeds of sales from the 29th of January, 1861, to the 30th of June, 1877, inclusive, of lands within the limits of that State heretofore embraced in Indian reservations. The reservations were known as the Shawnee, Absentee Miami, Kansas Trust, *Kansas Trust and Diminished Reserve*, *Osage Ceded*, *Osage Trust and Diminished Reserve*, New York Indian, and *Cherokee Strip*. The entire claim has been allowed by the Commissioner of the General Land Office and the account is now before this office for examination.

"The claim is founded upon the fifth clause of section 3 of the act for the admission of Kansas into the Union, approved January 29, 1861. That clause enacts that 5 per centum of the net proceeds of sales of all public lands lying within said State, which shall be sold by Congress after the admission of the State into the Union, after deducting all expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, or for other purposes, as the legislature shall direct. * * *

"The case turns upon a proper answer to be given to the question, What lands were public lands lying within said State, within the meaning of this clause?"

At the date of the passage of the act there were Indian

Kansas Five Per Cent. Fund—Payment of.

reservations within the exterior limits of the State which embraced about 13,800,000 acres. But the Comptroller holds that certain of these lands can not go into the account for reasons given, but he decides that—

“The rest of the lands included within Indian reservations were held by the tribes accompanying them in the manner in which lands have usually been held by Indians occupying reservations. This title is popularly known as the common Indian title.

“In lands of the last-named class the Indians have no other title than a mere right of occupancy (*United States v. Cook*, 19 Wallace, 591). The possession when abandoned by the Indian occupants attaches itself to the fee without further grant (*Id.*). So restricted is their estate that though they may clear the lands of timber to such an extent as may be reasonable for a profitable use for agriculture, and may sell the timber thus removed, they may not sever timber except for this use. They may not sever it for the purpose exclusively of sale. If they do the severance is wrongful, and the timber when cut becomes the absolute property of the United States. (*Id.*) * * *

“The right of the United States to dispose of the fee of land occupied by Indians under the common Indian title has always been recognized by the courts of the United States from the foundation of the Government. * * *

“Not only have the courts uniformly decided that lands held by the common Indian title are public lands, but that they are such has been repeatedly assumed in the legislation of Congress. * * *

“Lands, therefore, held by Indians in reservations by the common Indian title are *public lands*. They will pass, subject only to the Indian right of occupancy, by a grant of public lands by the United States; and, in the absence of language evincing a different intent, a grant to a State by Congress of 5 per cent. of the proceeds of sales of the *public lands* within the State will be held to include 5 per cent. of the *proceeds of sales of lands held by Indians* by the common Indian title. * * *

“The grant of the 5 per centum having been made, it could not afterwards have been revoked. The right of the State

Customs Duties—Classification.

became by the grant a vested right which Congress could not recall. By treaties made *after* the admission of the State with the several tribes who occupied these lands it was stipulated that the net proceeds of the sales of all but one of the reservations, viz, the Kansas Trust, should be invested by the United States for the benefit of the respective tribes. Without doubt these treaties, together with subsequent acts of Congress passed to carry out their provisions, entitled these tribes to a sum equal to these net proceeds, but they did not destroy the *antecedent* right of the State of Kansas to the 5 per cent. which had been granted when the United States, holding the fee in said lands, had capacity to make the grant and made it without provision for any subsequent limitation. * * *

"In the light of this legislation, and of the clear provisions of the act for admitting Kansas, it would appear to be doing violence to the terms of the act and to the policy of Congress to construe the 5 per cent. clause to be applicable only to lands to which the Indian title had been extinguished prior to the admission of the State.

"The amount ascertained to be due to the State of Kansas on the account under examination will therefore be reported to the Secretary of the Treasury." * * *

This decision, under the language of the appropriation, seems to be conclusive upon this point.

I am constrained, therefore, by these considerations, to answer the question asked by the First Comptroller in the affirmative.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

CUSTOMS DUTIES—CLASSIFICATION.

Sawed mahogany boards are not dutiable under schedule D (act of March 3, 1883, chapter 121) as "manufactures of mahogany," but are dutiable under the provision of that schedule "for all other articles of sawed lumber," etc. Opinion of Attorney-General Garland of January 21, 1887 (18 Opin. 535), concurred in.

Customs Duties—Classification.

DEPARTMENT OF JUSTICE,

July 16, 1889.

SIR: I have the honor to acknowledge the receipt of the communication from your Department, dated June 15, asking my opinion "as to the classification, under existing tariff acts, of sawed mahogany boards." You state that the question now at issue is whether imported "sawed mahogany boards are dutiable at the rate of \$2 per thousand feet, board measure, under the provisions of Schedule D, T. I. 219, for all articles (varieties) of sawed lumber," or "at the rate of 35 per cent. ad valorem," under the further provisions of Schedule D, T. I. 232, for "manufactures of mahogany."

The question is not without great difficulty, as the various provisions of the tariff acts, as they now exist and have heretofore existed, are conflicting, and have naturally been subjects of conflicting decisions in the administration of your Department. However, whenever the question at issue has been the subject of adjudication in the courts, the decisions seem to have been uniform, and upon a well-defined principle. In determining whether an article is subject to duty as a "manufacture," the test applied by the courts is, whether by the application of labor, manual or mechanical, it has been put in a condition for "ultimate" consumption; that is, whether it is ready to be put to its final use without further manipulation or "manufacture." Of course, the application of this test is liable to some uncertainties and exceptions; but this is the general principle. An article may be in condition for remanufacture and at the same time largely used for "ultimate" consumption, and in that case it would be liable as a "manufacture;" as, in the case of India rubber (*Lawrence v. Allen*, 7 Howard, 785). But, as expressly decided in that case, the test is the adaptability of the article and its use, in the form of its importation, for "ultimate" consumption without remanufacture. This principle has been a number of times applied by the courts. The latest decision upon this question is *Hartranft v. Wiegmann* (121 U. S., 609), where it was held that "shells cleaned by acid and then ground on an emery wheel and some of them afterward etched by acid, and all intended to be sold for ornamental purposes" were "manufactures" and not "lumber."

Employment of United States Troops in Alaska.

ments as shells, were not dutiable at 35 per cent. ad valorem as manufactures of shells." The rule above stated, and the cases illustrating and supporting it set forth in that decision, are, it seems to me, conclusive on this question. It is matter of general information that ordinary sawed mahogany boards are not used in that form as articles of ultimate consumption, but are fitted for such consumption by remanufacture and manipulation. I therefore adhere to the opinion of my predecessor, given to your Department under date of January 21, 1887, to the effect that "sawed mahogany boards are not dutiable as manufactures of mahogany."

I return herewith all of the papers.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

EMPLOYMENT OF UNITED STATES TROOPS IN ALASKA.

Question as to what extent and under what circumstances the military forces of the United States may be used for the protection of life and property in Alaska, considered; and the views expressed in a former opinion, dated April 18, 1889 (*ante*, p. 293), submitted as covering the question.

DEPARTMENT OF JUSTICE,

July 19, 1889.

SIR: I have the honor to acknowledge the receipt of your letter of yesterday, asking my opinion as to the extent of the use which could be made of the United States troops for the protection of life and property in Alaska, having in view the restrictive provisions of the act approved June 18, 1878.

Answering this request, I have the honor to say that the following is an opinion which I rendered to the President under date of April 18 last, which I think covers the question you submit.

[Here follows the opinion referred to. See *ante*, p. 293.]

The condition of things in Alaska, under the act providing for the civil government (23 Stat., 24), does not, so far as this question is concerned, differ from that in Oklahoma, with reference to which the opinion was given.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

Chinese Laborers.

CHINESE LABORERS.

Opinion of Attorney-General Brewster, of December 26, 1882 (17 Opin., 483), touching the right of Chinese laborers to pass through the United States in the course of their journey to and from other countries, reaffirmed.

The application of that opinion to the case presented is unaffected by the acts of July 5, 1884, chapter 220, and October 1, 1888, chapter 1064.

DEPARTMENT OF JUSTICE,
July 23, 1889.

SIR: I have the honor to acknowledge the receipt of your two communications upon the subject of "the transit of Chinese laborers through the territory of the United States in the course of their journey to or from other countries," one under date of July 19, instant, inclosing a letter of the Solicitor of the Treasury, a circular of the Treasury Department, No. 5, dated January 23, 1883, and a telegram from John W. Foster, counsel of the Chinese legation, the other under date of July 20, inclosing a letter from the Acting Secretary of State and a copy of a telegram from the Chinese minister.

You state: "Certain Chinese laborers have arrived at the port of New Orleans and are now awaiting the determination of the question as to whether they have the right to pass through to San Francisco for the purpose of embarking for China, and I will therefore thank you for an expression of your opinion on this question at as early a day as practicable."

In reply I would say that the same question arose under the act of May 6, 1882 (22 Stat., 58). It was submitted to this Department, and the opinion of December 26, 1882 (reconsidering a former opinion) was given. The conclusions reached in that opinion I believe to be correct.

Moreover, it appears that from that time the Department of State uniformly, and the Treasury Department generally, have recognized and acted upon the construction given therein, at least down to the passage of the act of October 1, 1888.

Manifestly, the act of July 5, 1884 (23 Stat., 115), did not render the opinion inapplicable to the question submitted, nor does the act of October 1, 1888, known as "the Scott exclusion act" (25 Stat., 504), affect its application. That act was directed to "Chinese laborers" who had been or might be residents here, and related to their departure and return.

Fort Missoula Military Reservation.

I have been able to find no other legislation bearing materially upon the question. But it is possible that some of the "collectors of customs" to whom you refer may have been influenced by the stringent provisions of the act of September 13, 1888 (25 Stat., 476). The restrictive provisions of that act, however, by its very terms, do not take effect till "the date of the exchange of ratifications of the pending treaty," which date has not yet arrived.

I therefore adopt the carefully considered opinion of this Department, given under date of December 26, 1882, as expressing my views upon the question you submit, without additional argument.

I return the inclosures as requested.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

FORT MISSOULA MILITARY RESERVATION.

By Executive order of August 5, 1878, 50 acres of land were added to the Fort Missoula military reservation, which was originally established with an area of 640 acres by Executive order of February 19, 1877. The land covered by these orders was formerly within the Territory of Oregon; but under the act of March 2, 1853, chapter 90, establishing the Territory of Washington, it fell within the latter Territory; and when the Territory of Montana was created, by the act of May 26, 1864, chapter 95, it became a part of that Territory, and so remained at the time said orders were issued. By the act of February 14, 1853, chapter 69, it was provided that all reservations theretofore as well as thereafter made under the act of September 27, 1850, chapter 76 (which applied to Oregon only), should as to forts be limited to not exceeding 640 acres at any one place; and the aforesaid act of May 26, 1864, declared that all laws of the United States not locally inapplicable shall have the same force and effect within the Territory of Montana as elsewhere within the United States: Held that the act of 1864 was intended to give effect in Montana only to such general laws of the United States as were not inapplicable to that Territory, and not to legislation of a special or local character; that the limitation of 640 acres was not made operative thereby in Montana; that the President was fully empowered to make the order of August 5, 1888; and that while such order remains unrevoked the land covered thereby is not open to entry or settlement.

Fort Missoula Military Reservation.

DEPARTMENT OF JUSTICE,

July 31, 1889.

SIR: Your communication of the 22d April ultimo presents for opinion the question of the validity of the Executive order of August 5, 1878, by which 50 acres of land were added to the Fort Missoula Military Reservation of 640 acres originally established by an Executive order made on February 19, 1877. This Executive order of August 5, 1878, enlarging the reservation, the late Secretary of the Interior declared to be invalid, because made without authority and in contravention of the 9th section of the act of Congress of February 14, 1853 (10 Stat., 158).

The land covered by both Executive orders lay within the boundary of the Territory of Oregon, as defined by the act of August 14, 1848. (9 Stat., 323.)

By the fourteenth section of the act of September 27, 1850 (9 Stat., 500), being "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," the authority of the President to make reservations for the purposes of "forts, magazines, arsenals, dock-yards, and other needful public uses" was without any restriction whatever.

In this particular, however, the act was amended by section 9 of the act of February 14, 1853 (10 Stat., 159, 160), which is entitled "An act to amend an act entitled 'An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and to make donations to the settlers of the said public lands,' approved September twenty-seventh, eighteen hundred and fifty." This act provides that all reservations heretofore as well as hereafter made under the act of September 27, 1850, shall as to *forts* be limited to an amount not exceeding 640 acres "*at any point or place*."

At the time the Executive order of August 5, 1878, enlarging the reservation, was made, the land covered by it, as well as by the Executive order of February 19, 1877, had ceased to be within the boundaries of the then State of Oregon, and was in the Territory of Montana.

Fort Missoula Military Reservation.

It appears by the act of March 2, 1853 (10 Stat., 172), entitled "An act to establish the Territorial government of Washington," that the land covered by the executive orders in question was taken from the then Territory of Oregon and thrown within the limits of the Territory of Washington, as fixed by that act. And that by section 6 of the act of July 17, 1854 (10 Stat., 305), entitled "An act to amend the act approved September twenty-seven, eighteen hundred and fifty, to create the office of surveyor-general of the public lands in Oregon, etc., and also the act amendatory thereof, approved February nineteen (fourteen), eighteen hundred and fifty-three," it is declared that all the provisions of this act, *and the acts of which it is amendatory, shall be extended to all the lands in Oregon and Washington Territories.*"

Afterwards, when the Territory of Montana was created partly out of the Territories of Oregon and Washington by the act of May 26, 1864 (13 Stat., 85), the land covered by the Executive orders in question fell within the limits of the new Territory of Montana when the Executive orders in question were made, and still is.

The legislation by virtue of which it is contended that the second Executive order of August 5, 1878, was invalid is that part of the thirteenth section of the act of May 26, 1864 (*supra*), which provides "That the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Montana as elsewhere within the United States."

It is said that the limitation of 640 acres for forts, at first especially applied to Oregon Territory, and, afterwards, *especially applied* to Washington Territory, is in force in Montana under the provision just quoted from the act of May 26, 1864, because that limitation is not locally inapplicable to Montana.

But was it the purpose of Congress to make operative in Montana all the special and local legislation in the statute books of the United States that might not be locally inapplicable to that particular region? It is manifest that the argument that would admit *any* particular special legislation would necessarily extend to *all*; the language being "*all laws* * * * *not locally inapplicable.*" The result of such an in-

Fort Missoula Military Reservation.

terpretation of the act of 1864 would be a medley of laws, no one of which might be locally inapplicable to Montana, while, taken together, they would make an incongruous mass of legislation.

In my view such was not the intention of Congress, but that intention was, I think, to give effect in Montana only to all *general* laws of the United States not locally inapplicable; such, for instance, as laws relating to civil rights, marine ports of entry, etc. I do not think it would be reasonable or safe to give any larger sense to the act of 1864.

In addition to the considerations already stated, it may be remarked that the legislation specially applicable to Oregon was, as we have seen, made operative in Washington Territory by *express terms*, and it may be entitled to some weight in this discussion that during the period of eleven years which has elapsed since the alleged invalid Executive order of August 5, 1878, was made, Congress has seemingly acquiesced in that order, which would probably not have been the case if Congress had thought that the executive department of the Government had acted in open disregard of limitations of authority which were intended to apply to that department.

Unless, therefore, I should take the extraordinary position that the effect of section 9 of the act of 1853 (*supra*) was to impose a burden on all the land in the then Territory of Oregon, and that Congress intended that the burden so imposed should run with and follow that land, like a covenant, after the land had ceased to belong to that particular Territory, I must conclude that the Executive order of August 5, 1878, was not in conflict with section 9 of the act of February 14, 1853 (*supra*), that statute having no application to the subject whatever.

If it is objected that, if we exclude, as inapplicable to these lands in Montana, the act of 1853 restricting the reservation to 640 acres, we for the same reason must exclude the original act of 1850, which, it is said, grants to the President the power to make any reservation. To this I answer that in my opinion the validity of the Executive order of August 5, 1878, and that of February 19, 1877, to which it was supplemental, rest not on that statute, but on a long-established and long-recognized power in the President to withhold from

Fort Missoula Military Reservation.

sale or settlement, at discretion, such parts of the national domain, open to entry and settlement, as he may deem proper. This power Congress recognizes in the legislation above discussed, which does not grant any such power, but only seeks to restrict one already existing. When Congress creates an exception from a power, it necessarily affirms the existence of such power, and hence the well known axiom that the exception proves the rule.

It may indeed be stated that Congress has, in other legislation, repeatedly recognized the existence of this power of the President. For instance, the pre-emption act of 29th of May, 1830 (4 Stat., 421), contains the following clause: "Nor shall the right of pre-emption contemplated by this act extend to any land which is reserved from sale by act of Congress or by order of the President, or which may have been appropriated for any purpose whatever." So by the pre-emption act of September 4, 1841 (5 Stat., 456), "land included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes, are exempted from entry under the act."

In addition to this Congressional recognition, the Supreme Court of the United States has repeatedly adjudged the existence of this power in the President. (*Wolcott v. Des Moines Company*, 5 Wall., 681; *Grisar v. McDowell*, 8 ib., 363; *Wolsey v. Chapman*, 101 U. S. R., 755; *Williams v. Baker*, 17 Wall., 144; *Wilcox v. Jackson*, 13 Pet., 498).

It follows, therefore, that the President was fully empowered to make the Executive order of August 5, 1878, and that while that order remains unrevoked the land covered by it is not open to entry or settlement. In reaching this conclusion I have not overlooked the distinction, claimed on behalf of the War Department to obtain, between "posts" and "forts," and which some of the statutes seem to recognize, but have preferred to rest my conclusions on the broader grounds that the restrictive act of 1853 is wholly inapplicable to these lands in Montana.

I have the honor to be, sir, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF WAR.

Rock Island Bridge.

ROCK ISLAND BRIDGE.

Provision in the act of March 2, 1889, chapter 411, making an appropriation "for repairs to draw-pier of the Rock Island Bridge," etc., considered with reference to the duty thereby devolved upon the Secretary of War concerning its expenditure, and the further duty to require of the Chicago, Rock Island and Pacific Railroad Company reimbursement of one-half of the expenses incurred in said repairs.

DEPARTMENT OF JUSTICE,
August 14, 1889.

SIR: I have the honor to acknowledge the receipt of your communication under date of August 7 instant (with inclosures), requesting that this Department advise the Secretary "whether or not he should go on and execute the law, notwithstanding the letter of May 21" inclosed.

The "law" referred to is in the appropriation act (25 Stat., 963), and is as follows:

"For repairs to draw-pier of the Rock Island Bridge, and for replacing the cement in the joints of the stones forming the piers of the Rock Island Railroad and wagon bridges, thirty-seven thousand six hundred and eight dollars; and the Secretary of War shall require of the Chicago, Rock Island and Pacific Railroad Company the reimbursement of one-half of all the expenses incurred in the repairs of said draw-pier under this and the appropriation of fifty thousand dollars made for this object in the sundry civil appropriation act for eighteen hundred and eighty-nine, as provided in their guaranty executed to the United States under the acts of Congress providing for the construction of said bridge."

The "letter" referred to is dated May 21, 1889, and is as follows:

"SIR: A few days since the attention of the officers of this company was called to certain plans for the construction of a draw-pier under the bridge at Rock Island. The execution of these plans involves the expenditure of a much larger sum of money than is needed for the repair of the pier, which formed a part of the bridge when it was completed. This company was not consulted in regard to such

Rock Island Bridge.

plans before they were adopted by the officers of the War Department, and this is to advise you that it will decline to contribute to the expenses which may be incurred in erecting such pier any sum in excess of one-half of what would be the necessary cost of placing the existing one in as nearly as is practicable the condition it was in when the bridge was completed.

"Respectfully,

"R. R. CABLE, *President.*

"Hon. REDFIELD PROCTOR,

"*Secretary of War, Washington, D. C.*"

I know of no rule of law which compels you to expend all of the sum above appropriated, or any more than shall be necessary for you to *properly* do the work specified in the above appropriation. So much of the sum as it is *necessary* for you to use for the purposes indicated you can not well avoid using. How much that is it is not for this Department to say. That is purely a question of administration in your Department, and calls for the exercise of good judgment, bearing in mind that temporary repairs are not always the most economical or the most expedient. The same wise discretion, inside the lines of the appropriation, of course, should be exercised in this matter of public interest as would be given to a private matter of like character, magnitude, prominence, and importance.

If the question as to the necessity of any expenditure is in doubt, due weight should be given to the judgment of the law making power as expressed in the appropriation.

The letter of the president of the company, above quoted, in no way relieves you from the performance of your duty, as above indicated. It does not change your legal rights or relations with the company, the Government, or the public. It naturally and properly may tend to induce a more careful scrutiny, and perhaps revision, of plans of the contemplated work, to see whether they are necessary, within the definition above given; but nothing in it should prevent the exercise of the wise, prudent, and comprehensive judgment required of you in the first instance.

Convicts of Consular Courts.

When the Government shall have performed its duty, it will doubtless be ready to require the railroad company to comply with the terms of its contract and perform its duty.

Very respectfully,

O. W. CHAPMAN,

Acting Attorney-General.

The SECRETARY OF WAR.

CONVICTS OF CONSULAR COURTS.

There is no statute which authorizes a convict, sentenced to prison by a consular court of the United States, to be brought to the United States for imprisonment and there held to serve out his sentence; and in the absence of such a statute, the removal of the convict to this country for that purpose would be unlawful. Opinion of Attorney-General Williams, of February 4, 1875 (14 Opin., 522), cited with approval.

The President, by virtue of his office and without authority given by some statute, has no power to remove a convict from one prison to another.

DEPARTMENT OF JUSTICE,

August 14, 1889.

I have the honor to acknowledge the receipt of your communication of August 3, 1889, in which you ask for my opinion upon the following questions:

“(1) Can a convict sentenced to a prison by a consular court of the United States sitting in Madagascar be lawfully conveyed to the United States for imprisonment, and there held to serve out his sentence?

“(2) If so, what are the necessary formalities and procedure to effect the transportation of the prisoner and lodge him in the prison selected for his confinement in the United States?”

In reply thereto, I would say that on the 12th of May, 1864, Congress passed an act (13 Stat., 74) conferring on the Secretary of the Interior power to designate the place of confinement for United States prisoners convicted of crime in a District or Territory where there was no suitable penitentiary.

This act was limited in its application to prisoners convicted in courts within the boundaries of the United States.

Convicts of Consular Courts.

The proviso in the first section uses language which hardly admits of any other interpretation.

On the 5th of March, 1872 (17 Stat.; 35), this power was transferred to the Department of Justice.

These acts were incorporated into section 5546 of the Revised Statutes (first edition).

On the 4th of February, 1875, the Attorney-General rendered an opinion to the Secretary of State, in which he held that the sentence of imprisonment imposed by a consular court clothed with criminal jurisdiction "can not be legally executed beyond the territorial jurisdiction of the court which pronounced it, unless authority thus to execute the sentence is conferred by the legislature," and that, therefore, prisoners convicted at Smyrna or Constantinople could not legally be held if sent to this country for imprisonment.

It appears from the records of Congress and of this Department that the Attorney-General in his report for the year 1875 called the attention of Congress to section 5546 of the Revised Statutes (first edition), and said that by it "the Attorney-General is empowered, when at the time of *conviction* there may be no suitable prison in the district, to designate some prison in a convenient State or Territory; but has no power after the criminal is consigned to a State prison to change his place of confinement or relieve him from inhuman treatment. Such authority might easily be given by Congress."

Certain correspondence also passed between the Attorney-General and Senator Clayton (who subsequently introduced a bill in the Senate to amend the section referred to) in relation to this subject, which shows that it was the intent of the amendment to empower the Attorney-General to change the place of confinement after the prisoner had been consigned to any State prison.

Congress thereupon, on the 12th of July, 1876 (19 Stat. 88), amended the section (Rev. Stat. 5546), so that it now reads (amendments in italics) as follows:

"All persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a District or Territory where at the time of conviction, *or at any time during the term of*

Convicts of Consular Courts.

imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced, *or during the residue of said term*, in some suitable jail or penitentiary in a convenient State or Territory to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia, the transportation and delivery shall be by the warden of the jail of that District; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the Attorney-General, out of the judiciary fund. But if, in the opinion of the Attorney-General, the expense of transportation from any State, Territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be *changed in any case, when, in the opinion of the Attorney-General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment: Provided, however, that no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf.*"

There is nothing, therefore, in this amendment, when read in the light of its history, which extends the Attorney-General's authority beyond the boundaries contemplated in the section as it stood before the amendment.

Convicts sentenced in consular courts seem to be specially provided for in section 4121, which enacts that the President, when provision is not otherwise made, is authorized to allow, in the adjustment of the accounts of such

Convicts of Consular Courts.

consul, the actual expenses of the rent of "suitable buildings" to be used as a prison, "and also the wages of the keepers of the same and for the care of offenders," not to exceed a limited sum.

The question remains, whether the President has power, by virtue of his office, to remove the prisoner.

In your letter you call my attention to the fact that the President of the United States has twice in different cases by executive order directed that prisoners convicted of crimes in foreign countries by consular courts of the United States be brought here to serve out the residue of their sentences in a suitable penitentiary; but it appears that in each of the cases commutation of death sentence was made conditional upon the prisoner assenting to his transfer to the United States and confinement in a penitentiary therein.

In the case of Stephen P. Mirzan, brought to this country under executive order of August 3, 1882, it appears that on July 29, 1880, the President by executive order pardoned the said Mirzan, "on condition that the said Stephen P. Mirzan be imprisoned for the term of his natural life in the United States consular prison at Smyrna aforesaid, or in such other prison or prisons from time to time in said dominions, or in the United States, as the President of the United States of America may at any time hereafter direct." In the other case to which you refer—that of William Dinkelle—a pardon was granted on August 6, 1880, "on condition that the said William Dinkelle be imprisoned at hard labor for the term of his natural life in the *Albany* penitentiary, in the State of New York." It has been held that the President has power, under the language of the Constitution, to pardon conditionally, and that the acceptance by the convict of the condition binds him. (18 How., 307). It will be seen, therefore, that there is nothing in this executive action which is in any way in contravention of the opinion of the Attorney-General above referred to. It does not seem to me that the President, by virtue of his office, has authority to remove a prisoner from one prison to another by mere executive order, unless such power is expressly given by some statute, and I am unable to find any such statute.

In is evident that Congress did not have in mind at the

Timber Trespasses.

time of the passage of the acts hereinbefore cited the case of prisoners convicted by consular courts. The former opinion of this Department therefore seems applicable to the case in hand.

Very clearly this case is one of a class for which some provision should be made. It is presumed that the prisoner can be retained in custody under section 4121, Revised Statutes, until such time as Congress shall have an opportunity to pass upon the propriety of an amendment extending section 5546 so as to cover cases of conviction in consular courts.

The conclusion I have reached renders it unnecessary to answer your second question.

Very respectfully,

O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF STATE.

TIMBER TRESPASSES.

The provisions of sections 2461, 2462, 2463, and 4751, Revised Statutes, are intended to protect and preserve live oak, red-cedar, and other like timber, whether the same shall be upon land reserved or purchased by the United States for the purpose of supplying such timber for the Navy, or whether it be upon other lands of the United States, provided only that the timber is live oak, or red-cedar, or other like timber, such as would be useful to the Navy for naval purposes.

Where trespasses were committed in the State of Michigan, by cutting, destroying, removing, etc., live oak or red-cedar trees, or other like timber useful for naval purposes, on and from lands belonging to the United States: Advised that informers in such cases are entitled to one-half of the penalties, etc., recovered under section 4751, Revised Statutes, bearing in mind the power given to the Secretary of the Navy in that section.

DEPARTMENT OF JUSTICE,

August 15, 1889.

SIR: I have the honor to acknowledge the receipt of your letter of August 5th, instant, with inclosures, in which you submit for my consideration "the question whether informers of trespasses committed in the State of Michigan are entitled to one-half the penalty and forfeiture incurred under the provisions of sections 2461, 2462, and 2463, Revised Statutes," and requesting an opinion thereon.

Timber Trespasses.

In reply I would say that section 2461 provides that (omitting the unnecessary portions) "If any person shall cut * * * or aid * * * in cutting, or shall wantonly destroy * * * or aid * * * in wantonly destroying, any live-oak or red-cedar trees, or other timber * * * being on any lands of the United States which in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States for supplying or furnishing therefrom timber for the Navy of the United States; or if any person shall remove * * * or aid * * * in removing from any such lands which have been *reserved* or *purchased*, any live-oak or red-cedar trees or other timber unless * * * for the use of the Navy of the United States; or if any person shall cut * * * or aid * * * in cutting any live-oak or red-cedar trees or other timber on, or shall remove * * * or aid * * * in removing any live-oak or red-cedar trees or other timber from *any other lands* of the United States acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever other than for the use of the Navy of the United States, every such person shall pay a fine of not less than triple the value of the trees or timber so cut, destroyed, or removed," etc.

It seems clear that this section is directed to the preservation of live-oak and red-cedar trees, and other timber of like character, useful to the Navy of the United States, not only upon the lands of the United States which have been *reserved* or *purchased* for the express purpose of furnishing timber for the Navy, but also live-oak and red-cedar trees and other timber useful to the Navy upon other lands of the United States actually acquired at the time of the passage of the section or which might be thereafter acquired.

Section 2462 provides: "If the master, owner, or consignee of any vessel shall knowingly take on board any timber cut on lands which have been *reserved* or *purchased* as in the preceding section prescribed * * * for the use of the Navy of the United States; or shall take on board any live-oak or red-cedar timber cut on *any other lands* of the United States with intent to transport the same * * * or to ex-

Timber Trespasses.

port the same * * * the vessel * * * shall * * *, be wholly forfeited to the United States, and the captain or master of such vessel * * * shall forfeit and pay to the United States a sum not exceeding one thousand dollars."

This section seems also to recognize not only timber cut from lands which have been *reserved* or *purchased* for the use of the Navy, but also live-oak and red cedar timber cut from other lands belonging to the United States.

Section 2463 makes it the duty of the collectors within the States of Alabama, Mississippi, Louisiana, and Florida, before allowing a clearance to any vessel laden with live-oak timber, to ascertain satisfactorily that such timber was cut from private lands, or if from *public lands*, cut by consent of the *Navy Department*. It also makes it the duty of the customs officers and land officers of those States to cause prosecutions to be seasonably instituted against all persons known to be guilty of depredations on or injuries to the live-oak growing on the public land.

The substance of the first part of this section is also contained in section 4205, Revised Statutes.

Section 4751 provides that "All penalties and forfeitures incurred under the provisions of sections twenty-four hundred and sixty-one, twenty-four hundred and sixty-two, and twenty-four hundred and sixty-three, title 'The Public Lands' shall be sued for, recovered, distributed and accounted for, under the directions of the Secretary of the Navy, and shall be paid over, one-half to the informers, if any, or captors, where seized, and the other half to the Secretary of the Navy for the use of the Navy pension fund, and the Secretary is authorized to mitigate, in whole or in part, on such terms and conditions as he deems proper, by an order in writing, any fine, penalty, or forfeiture so incurred."

The object sought to be attained by this legislation apparently is to protect and preserve live-oak and red-cedar, and other like timber, whether the same shall be upon lands reserved or purchased by the United States for the purpose of supplying such timber for the Navy, or whether it be upon other lands of the United States then owned, or thereafter to be owned, by the United States, provided only that the

Timber Trespasser.

timber was live-oak or red-cedar trees, or other like timber such as would be useful to the Navy for Navy purposes. And in order the more clearly to indicate that the object of this legislation was to protect and conserve the interests of the Navy, section 4751 confers special and in some respects extraordinary powers (see 15 Opin., 436) upon the Secretary of the Navy, who, as the head of his Department, is presumed to have full information as to the needs of the Government, and a direct interest in the preservation of all such timber as is specially useful in naval architecture.

I have used the phrase "or other *like* timber," following the words "live-oak or red-cedar trees," in accordance with the following rule of statutory construction: "Where particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind with those which precede." (Potter's Dwarris on Stats., 236. See also Sedgwick on Stats., 361, 2d edition; Endlich on Stats., sec. 405 *et seq.*)

If, therefore, the "trespasses committed in the State of Michigan," to which you refer in your question, consist in the cutting, destroying, removing, etc., of "live-oak or red-cedar trees," or other like timber useful for Navy purposes, from lands belonging to the United States, I am unable to see why "informers" thereof are not entitled to "one-half the penalties and forfeitures" referred to in section 4751, bearing in mind, of course, the power given therein to the Secretary of the Navy.

If the trespasses to which you refer do not pertain to the class of Navy timber described, then the sections above do not apply; and it will be readily seen that not infrequently it may be a question of fact as to whether the case in hand is or is not covered by the sections quoted.

Very respectfully,

O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

Claim of Pennsylvania—Re-examination of.

CLAIM OF PENNSYLVANIA—RE-EXAMINATION OF.

Where a resolution of the Senate (dated January 10, 1889) directed the Secretary of the Treasury "to re-examine and audit the claim of the State of Pennsylvania for money expended in 1864, for which reimbursement was provided by act of April 12, 1866," and it appeared by that act the claim was required to be "examined and settled by the Secretary of War," by whom this duty had been discharged: *Held*, that the Secretary of the Treasury has not sufficient authority, under said resolution, to re-examine the claim in such sense as would make of the re-examination an audit, adjudication, or settlement thereof.

A resolution of one house of Congress can not empower the head of a Department to re-examine and audit a claim which by statute is required to be examined and settled by the head of another Department.

DEPARTMENT OF JUSTICE,

August 20, 1889.

SIR: I have the honor to acknowledge the receipt of your communication of August 5, instant, in which you refer a resolution of the Senate of January 10, 1889, to the "Attorney-General for his opinion as to whether, in view of the facts set forth in Senate Report No. 518, Fiftieth Congress, first session, and other papers bearing upon the case inclosed herewith, the Secretary of the Treasury is authorized under the within resolution of the Senate of the United States of January 10, 1889, to direct a re-examination of the claim of the State of Pennsylvania arising under the act of April 12, 1866 (14 Stat., 32), and report the balance found due thereon for the consideration of Congress?"

The resolution above referred to is as follows:

"IN THE SENATE OF THE UNITED STATES,
"January 10, 1889.

"Resolved, That the Secretary of the Treasury be, and is hereby, directed to re-examine and audit the claim of the State of Pennsylvania for money expended in 1864, for which reimbursement was provided by act of April 12, 1866 (14 Stats., 32), and to report the balance found due thereon for the consideration of Congress, provided the appropriation made by said act is not available to the payment thereof.

"Attest:

"ANSON J. MCCOOK,

Secretary."

Claim of Pennsylvania - Re-examination of.

On March 3, 1817 (3 Stat., 366), Congress provided that all claims against the United States should be settled and adjusted in the Department of the Treasury, and the revisers embodied this provision in section 236 of the Revised Statutes. In the absence of any other legislation, this section would undoubtedly confer upon you authority to act upon the matter referred to in the above resolution. But on April 12, 1866 (14 Stat., 32), Congress, with this act before it, for satisfactory reasons, saw fit to declare that the Secretary of War should examine and settle this particular claim. The act making the appropriation hinges its payment upon the following proviso:

"Provided, That before the same is paid the claim of the said State shall be again examined and settled by the Secretary of War."

In accordance with the above proviso the vouchers and pay-rolls were examined by the Paymaster-General and Provost Marshal General, and a report was made to the Secretary of War, and thereon the Secretary approved the claim to the extent of \$667,074.35, and issued his requisition, No. 4195, June 16, 1866, for that amount. It seems clear that this award was an adjudication by the Secretary of War under this act, and this Department has so held. (16 Opin., 489.)

It appears further that the precise sum which the Secretary of War approved, after his examination and settlement under this act, was paid by your Department under its warrant, No. 8447, dated June 18, 1866, for \$667,074.35.

There is, however, accompanying this warrant (and that is the only thing that raises any question here) the following:

"NOTE.—This payment approved by the Secretary of War is made as an advance to the State of Pennsylvania. The accounts as approved by the Secretary of War not having been fully stated and passed by the accounting officers of the Treasury Department, will be subject to re-examination and final settlement at this Department hereafter."

*"H. McCULLOCH,
"Secretary."*

Now, if what was then paid was simply "an advance," and if the account, "*as approved by the Secretary of War*," had not been "fully stated and passed by the accounting officers of the

Claim of Pennsylvania—Re-examination of.

Treasury Department," and was therefore "subject to re-examination and final settlement" at your Department, as stated in the above "note," a very different question is presented than the one herein considered. But the records seem to show a materially different state of facts. It appears that the accounts *as approved* by the Secretary of War had been fully stated and passed by the accounting officers of the Treasury Department, and that the exact sum found by the Secretary of War upon his examination, and approved by him, and for which he drew his requisition, was paid by your Department. Indeed, the papers indicate that your Department did not make, and never has made, any examination in the sense of an adjudication of this claim; and the letter received to-day from your Department assures me that while the accounting officers in your Department did "*technically*" state and pass the account *as approved* by the Secretary of War, they did so "*without examination, and passed the amount thereof to the credit of Pennsylvania on the books of the Auditor, to offset the charge which had been raised by the requisition of the Secretary of War.*" All that the accounting officers of the Treasury Department did therefore, apparently, was to examine and audit the *requisition* of the Secretary of War, recognizing that it was *his* duty under the act to examine and audit the claim.

And now these accounting officers insist that, inasmuch as both Houses of Congress have provided by statute that the Secretary of War shall be the tribunal to examine and settle this claim, one House alone can not by mere resolution in effect repeal such provision and take away from the War Department the jurisdiction once given. This position is sustained by very eminent authority. It was held by Attorney-General Cushing, in an elaborate and carefully considered opinion, that while joint resolutions of Congress are binding, "separate resolutions of either House of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or of the heads of Departments." (6 Opin. 680.)

My attention has been called to the opinion of Attorney-General Black (9 Opin., 387), to the effect that when a claim has been referred by Congress to a head of a Department,

Claim of Pennsylvania—Re-examination of.

and his construction defeats the claim, in whole or in part, and Congress afterwards by reports of committees, or otherwise, indicates its opinion to be against his decision, the case *may* be opened by his successor. It will be noted, in passing, that he also holds that "such indications of opinion from the legislature are not binding on the Department, but are to be regarded merely as ground for the reconsideration of the case." This is but a declaration that the head of the Department has authority to reconsider a question decided by his predecessor, and that upon a reconsideration he is at liberty "to determine the case again, according to his own conscientious convictions of duty." That is good law, and if the Senate resolution had been directed to the *Secretary of War* this opinion would have been in point; but the question here is vastly different. It is whether a resolution of one House of Congress can empower the head of one Department to re-examine and audit a claim which both Houses by statute have declared shall be examined and settled by the head of *another* Department.

It seems to me that there can be but one answer to that question. It is respectfully submitted that it would never do to admit that one House can deprive a Department of jurisdiction once expressly given to it, or in any way nullify, overturn, or repeal the previous deliberate action of legislature and Executive.

I am constrained, therefore, to hold that you have not sufficient authority to direct a re-examination of the claim of the State of Pennsylvania, arising under the act of April 12, 1866, in any such sense as will make of such re-examination an audit, adjudication, or settlement of such claim.

You should not, however, overlook section 248 of the Revised Statutes, which requires that—

"The Secretary of the Treasury * * * shall make report and give information to either branch of the legislature, in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives." * * *

So far, therefore, as the resolution above requires you to "make report and give information" respecting the matter

Choctaw and Chickasaw Treaty of 1866.

referred to you therein, it is obligatory upon you. The request by the Senate is for information with a view to further legislation. I suggest, therefore, that you have an examination and report made giving to the Senate all the information available in compliance with its resolution.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

CHOCTAW AND CHICKASAW TREATY OF 1866.

Article 38 of the treaty of April 28, 1866, with the Choctaws and Chickasaws, which declares that "every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, etc., is to be deemed a member of said nation," does not confer upon such white person the right of suffrage.

Whether he is entitled to such right must be determined, not by that article alone, but by the provisions of the constitution of the nation in which he may be domiciled, and its laws relating to suffrage and elections.

DEPARTMENT OF JUSTICE,

August 28, 1889.

SIR: I have the honor to acknowledge the receipt of your letter of August 22, "requesting an opinion as to whether Article 38 of the treaty of 1866 (14 Stat., 769), between the United States and the Choctaws and Chickasaws, gives a white man, who marries a Choctaw or Chickasaw, the right of suffrage." Article 38 of that treaty reads as follows:

"Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw Nations, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

An opinion was rendered upon a question quite similar by Attorney-General Cushing, on January 7, 1857 (8 Opin., 300).

Article 5 of the treaty between the United States and the

Choctaw and Chickasaw Treaty of 1855.

Choctaws and Chickasaws, concluded June 22, 1855, reads as follows :

"Article V. The members of either the Choctaw or the Chickasaw tribe shall have the right freely to settle within the jurisdiction of the other, and shall thereupon be entitled to all the rights, privileges, and immunities of citizens thereof; but no member of either tribe shall be entitled to participate in the funds belonging to the other tribe."

The constitution of the Chickasaw Nation did not give to resident Choctaws the right of suffrage, and it was contended that the constitution was therefore in conflict with article 5 of the treaty above. Mr. Attorney-General Cushing held otherwise, pointing out with great clearness and force the distinction between citizenship and electorship, which pervades all public law of the United States. He states what, of course, is a matter of common information, that a very large majority of the citizens of any State or district are not electors; women may be, and most of them are citizens; so of minors, and yet they have not the right of suffrage. So, the provision conferring "all the rights, privileges, and immunities of citizens" does not necessarily include the right of suffrage.

It may well be, therefore, that article 38, above referred to, may make a white man who has married a Choctaw or Chickasaw and resides in either of these nations a member of said nation, subject to the laws of the nation, according to his domicile, and yet not entitle him to the right of suffrage. Whether he is entitled to such right must be determined not by article 38 alone, but by the provisions of the local constitution of the nation in which he may be domiciled and its laws with relation to suffrage and elections. A provision of the constitution or statute of the nation which should exclude such white men from suffrage would not be in conflict with article 38. I am unable, therefore, to say that article 38 entitles a white man, having so married and become domiciled in the nation, to the right of suffrage.

It may be of a little significance in this connection that article 3 of said treaty, providing for the condition of freedmen in the Choctaw and Chickasaw Nations, gives to them the right of suffrage. The language of that section, requiring

Arenas Key Island.

certain legislation on the part of the Choctaw and Chickasaw Nations as a condition of their receiving certain moneys, is that they shall make—

“Such laws and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, *including the right of suffrage*, of citizens of said nations,” etc.

It is fair to infer that if it had been the purpose of this treaty to confer the right of suffrage upon white men married and domiciled in these nations the language would have been equally explicit.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

ARENAS KEY ISLAND.

Upon the facts submitted in relation to the alleged abandonment upon the island of Arenas Key, Mexico, by the master of an American schooner, of three men, one of whom was killed by another of the three: Advised that, if a crime was committed by one of the men on the island, it was committed within the jurisdiction of Mexico, and the courts of the United States have no jurisdiction over the same; furthermore, that the master and owners of the vessel do not appear to have committed any offense cognizable under the statutes of the United States.

DEPARTMENT OF JUSTICE,

August 28, 1889.

SIR: I have the honor to acknowledge the receipt of your letter of August 23d, with the inclosures, giving an account of the abandonment upon the island of Arenas Key, by the master of the American schooner *Anna*, of three men belonging to that vessel. The papers seem to show that this island is within the jurisdiction of the Government of Mexico, though the property of Messrs. Bruner & Bro., of Chicago, Ill.; that it is a small uninhabited island, visited by this vessel for the purpose of bringing away a cargo of guano; that while at the island putting in the cargo, on account of vio-

Arenas Key Island.

lent storms and bad anchorage, it was concluded by those in charge of the vessel to be unsafe longer to remain; that, as a consequence, though having a charter authorizing the bringing away of 700 tons of guano, the vessel brought away only 70 tons and left upon the island three men to look after the property of the company (I suppose of Bruner & Bro.), the superintendent at the time of leaving promising that he would charter a vessel and send for the three men and the property of the company. There seems to have been left with these men 1 barrel of beef, 4 barrels of flour, and 1 peck of white beans and peas. The vessel, the schooner *Anna*, according to the statement of its master, left Arenas Key Island on the 29th of June, 1889, and on the 23d day of July, at Mobile, he made an affidavit setting forth the above facts, and stating that to the best of his belief no vessel had been sent for these three men, and that unless they were sent for they would probably perish, as they were out of the course of any vessels except those in the guano trade. This fact being made known to your Department, the United States steamer *Ossipee* sailed from Port Royal, Jamaica, on the 6th of August for Arenas Key, arriving there on the 11th. Two of the men (Evans and King), were found alive, the other (O'Brien), from the statement of King and Evans, appears to have been shot by Evans in self-defense. King and Evans are now on board of the *Ossipee*, at Hampton Roads, Virginia.

So far as it appears, these men were left upon the island without opposition on their part; there is nothing to indicate that any force or authority was used to compel them to remain. Under the circumstances I do not see that there is any occasion for action by this Department. If a crime was committed in the killing of O'Brien, it was committed within the jurisdiction of the Government of Mexico, and the courts of the United States are without jurisdiction in the premises.

In the second place, however culpable the owners of this vessel and island and their superintendent may be, it does not appear that they have committed any crime cognizable under the statutes of the United States. The section of the statutes more nearly covering the case than any other is section 5353 of the Revised Statutes, which makes the forcible abandonment of an officer or a mariner in a foreign port

Disbursing Agents of the Treasury Department.

a crime; but in this case it is not shown that these men were mariners or that they were left upon this island against their will.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

DISBURSING AGENTS OF THE TREASURY DEPARTMENT.

Upon consideration of the various statutory provisions in force relating to disbursing agents for the payment of moneys for the construction of public buildings (secs. 3657, 3658, and 255, Rev. Stat.): *Advised* (1) that in the absence of any special designation by the Secretary of the Treasury, the collector of customs of the district in which the building is being erected should act as such disbursing agent; (2) that it is competent to the Secretary, in any case, to designate the collector or any other bonded officer to act; (3) that when such building is at a place in which there is no collector, the Secretary may, in his discretion, designate a private citizen to act.

DEPARTMENT OF JUSTICE,

September 10, 1889.

SIR: I have the honor to acknowledge the receipt of your letter of August 26, in which you say:

“Referring to the several acts of Congress in regard to disbursing agents and to the fact that the records of the Department show that there has been no uniform rule observed in making appointments to such positions, I have the honor to request your opinion as to what bonded Federal officers should be appointed to such positions under the law, and as to whether there is any legal warrant, under any circumstances, to appoint a person not a bonded Federal officer as disbursing agent of funds on account of an appropriation for the construction of a public building.”

The following are the provisions of the statutes in relation to this subject-matter:

“The collectors of customs in the several collection districts are required to act as disbursing agents for the payment of all moneys that are or may hereafter be appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals, with such compensation, not

Disbursing Agents of the Treasury Department.

exceeding one-quarter of one per centum, as the Secretary of the Treasury may deem equitable and just." (Rev. Stat., 3657; June 12, 1858.)

"Where there is no collector at the place of location of any public work specified in the preceding section, the Secretary of the Treasury may appoint a disbursing agent for the payment of all moneys appropriated for the construction of any such public work, with such compensation as he may deem equitable and just." (Rev. Stat., 3658; July 28, 1866.)

"The Secretary of the Treasury may designate any officer of the United States who has given bond for the faithful performance of his duties to be disbursing agent for the payment of all moneys appropriated for the construction of public buildings authorized by law within the district of such officer." (Rev. Stat., 255; March 3, 1869.)

The statute first quoted (Rev. Stat., 3657) seems to make it obligatory that such moneys should be disbursed by the collector of the district in which the public building was being erected. Such a rule would sometimes involve great inconvenience. Accordingly, some years later, by section 3658, Revised Statutes, it was provided that in case the building was being erected at a place where there was no collector, the Secretary of the Treasury might appoint some other disbursing agent, no limitation being made as to the person. It will be observed that under the first section no appointment by the Secretary was necessary; the law fixed upon the collector as the disbursing agent, without any special designation by the Secretary. Three years after the enactment of this second statute a new statute was enacted (Rev. Stat., 255) giving to the Secretary of the Treasury the authority to designate any bonded officer of the United States to be disbursing agent in such case. This law is general and without limitation as to place. It applies to "all moneys appropriated for the construction of public buildings authorized by law within the district of such officer." This law is not inconsistent with either of the two preceding provisions in any such sense that all of them can not stand together. It modified the first provision (sec. 3657) to this extent, that it is no longer imperative that the collector shall be the disbursing agent for a building, even at the place of his location. It

Obstruction to Navigation.

seems to have been the sense of Congress, doubtless the result of experience, that it might be more conducive to public interest, even in a case where there was a collector located at the place where a public building was being erected, that some one other than the collector should act as disbursing agent. It is easy to understand that the multiplicity and magnitude of business imposed upon the collector of a great port like New York might make the imposition of this additional burden inexpedient and against public interest.

My conclusion, therefore, is :

First. That in the absence of any special designation the collector would act as such disbursing agent.

Second. That it is competent for the Secretary to designate the collector or any other bonded officer to act as such disbursing agent in any case.

Third. That in case of any such building at a place other than where there is a collector, the Secretary may designate a private citizen to act, in his discretion.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

OBSTRUCTION TO NAVIGATION.

The obstructions to navigation contemplated by sections 9 and 10 of the act of August 11, 1888, chapter 860, are such as pertain to the structure and plan of the bridge, in view of its location. Obstructions caused by failure to promptly open the draw of the bridge for passing vessels are not within those sections.

DEPARTMENT OF JUSTICE,
September 17, 1889

SIR: I have the honor to acknowledge the receipt of a letter from General R. Macfeely, Acting Secretary of War, with inclosures, under date of August 23, ultimo, "regarding complaints against the Pennsylvania Railroad Company and the Chicago, Burlington and Quincy Railroad Company for failure in promptly opening the draws of their bridges for passing vessels, and to request your [the Attorney-General's] opinion as to whether such failure constitutes such an ob-

Attorney-General.

struction to navigation as is contemplated by sections 9 and 10 of the river and harbor act of August 11, 1888 (25 Stat., 424 and 425)."

The "obstructions" referred to in the above-mentioned sections 9 and 10 are such as appertain to the structure of the bridge and its plan, in view of its location. They are such as, under the language of the sections, can be remedied by "alterations."

The obstructions complained of were apparently caused in each instance, not by any fault of structure, plan, or design of the bridge or its approaches, but by the negligence or willfulness of the bridge-tenders in their manipulation or operation of the "draw."

Whether or not these bridge-tenders were excusable under the circumstances surrounding them at the time may be a question for litigation, but it is one foreign to your present inquiry.

I return your inclosures as requested.

Very respectfully,

O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

Where numerous papers relating to a claim against the District of Columbia were referred by the Secretary of the Treasury to the Attorney-General with request for an opinion of the latter as to what action the Secretary should take in respect to the payment of the claim, in view of all the facts presented in the papers, but no statement of facts and no question of law were submitted by the Secretary, the Attorney-General declined to express any opinion in the matter as thus presented.

DEPARTMENT OF JUSTICE,

September 17, 1889.

SIR: On the 6th of February, 1889, Mr. Assistant Secretary Thompson, acting as Secretary, sent to this Department a communication from the First Comptroller addressed to the Secretary of the Treasury, dated January 29, 1889, re-

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lating to a claim of Samuel Strong against the District of Columbia, together with a large bundle of papers inclosed. The following indorsement appears on the Comptroller's communication :

“TREASURY DEPARTMENT

“February 6, 1889.

“Respectfully referred to the Hon. Attorney-General for his opinion as to what action the Secretary of the Treasury should take in connection with the payment of this claim in view of all the facts presented.

“HUGH S. THOMPSON,
“Secretary.”

This is the only inquiry made by your predecessor, upon the then Attorney-General, that I find in the papers.

It is to be observed that the indorsement presents no statement of facts, and, indeed, asks no question of law, but the Attorney-General is left to grope through all the papers, and possibly to pass upon all questions of law arising therein.

It is respectfully submitted that under the uniform rulings and decisions of this Department, from its organization down, the Attorney-General should not be asked to act on a case so presented. By section 356 of the Revised Statutes “the head of an Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department.” This provision has always been understood to require a specification of the question of law which is to be submitted, as will appear further on, so that the Attorney-General may be directly apprised of the very question of law on which his opinion is sought.

If then a statement of facts, in other words a case, had been submitted, the omission to specify any particular points of law for an opinion would alone prevent my acting on that case.

That it is not proper for me to act upon anything short of a case stated, the equivalent of a special verdict, is clearly shown by an opinion of Mr. Attorney-General Garland of the 12th of October, 1887, in which he says:

“It must, I conceive, be deemed settled that the Attorney-General can only act upon a determinate statement of facts

Attorney-General.

furnished by the officer asking his opinion (10 Opin., 267; 11 Opin., 189). ‘Where,’ says Mr. Attorney-General Stanbery, ‘a question of law arises upon facts submitted to the Attorney-General *such facts must be agreed and stated as facts established*’ (12 Opin., 205).’ Said Mr. Attorney-General Williams upon the same point: “I deem it proper here to remind you that where an official opinion from the head of this Department is desired on questions of law arising on any case, the requests should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted. By the observance of this simple rule the real point of difficulty in the case will be at once perceived, much inconvenience avoided, and more practicable and satisfactory results obtained.” (14 Opin. 367, 368.)

On June 23, 1887, Attorney-General Garland returned papers to the Secretary of the Interior with the following suggestion, which seems pertinent here:

“As I should prefer not to give an opinion upon such a case as I might collect from these inclosures, for fear that I might not see the case in all its parts in the same light as that in which it is seen by you, I have thought it best to ask a statement of the exact case on which an opinion is desired.”

I am quite sure that upon reflection you will fully concede the propriety and wisdom of the rule, and the reason for my return of the papers, to the end that you may, if you shall now so desire, present a statement of facts, and the question of law depending thereon which you wish answered.

It is proper that I should say further that the first knowledge I had of the existence of these papers was obtained just previous to my leaving the city near the close of last month. I took them up for examination, and found them in the condition above indicated. This reference having been made and left undisposed of by our predecessors, and the conflicting claimants being now actually engaged in the trial of the question as to their respective rights in the courts, it is possible that you may not now desire to present any question for adjudication; but, if otherwise, and you will give a statement of the facts upon which you wish an opinion, and will indicate the question of law which you desire answered, this

Prevention of Epidemic Diseases.

Department will, at the earliest opportunity, cheerfully take up and pass upon the question so presented.

Very respectfully,

O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

PREVENTION OF EPIDEMIC DISEASES.

Upon the facts submitted: *Advised*, that the President has authority to use so much of the unexpended balance of the sum appropriated by the joint resolutions approved September 26 and October 12, 1888, as may be necessary in his judgment for the purpose of keeping the various quarantine stations open throughout the fiscal year 1889-'90.

DEPARTMENT OF JUSTICE,
September 21, 1889.

SIR: I have just received your communication of September 18th, instant, transmitting "certain papers relating to the appropriation for preventing the spread of epidemic diseases."

The papers referred to consist of "letters from the Surgeon-General of the Marine-Hospital Service, the health officer of Savannah, the mayor of Savannah, and others, requesting that the various quarantine stations be kept open throughout the fiscal year 1889-'90." These reports and your letter assure me that there is need for the maintenance of these quarantines as sanitary defenses. You also assure me that "the Surgeon-General has received information of the outbreak of cholera in Asia Minor, European Turkey, and other places on the continent of Europe, and, to be prepared for the prevention of the introduction of cholera, it is in his opinion necessary that the quarantines shall be kept open throughout this coming winter, not only in the general interest but as a direct aid to local boards of health."

Upon these facts my opinion is asked as to whether or not the President is authorized to use so much as may be necessary of the unexpended balance of the sum appropriated by the joint resolutions approved September 26 and October 12, 1888, for the purpose of keeping the quarantine stations open throughout the fiscal year 1889-'90.

Prevention of Epidemic Diseases.

The two paragraphs referred to in your letter are as follows (25 Stat., 954):

"*Quarantine service.*—For the maintenance and ordinary expenses, including pay of officers and employés of quarantine stations at Delaware Breakwater, Cape Charles, South Atlantic Quarantine Station (Sapelo Sound), Key West, Gulf Quarantine Station, San Diego, San Francisco, and Port Townsend, fifty thousand dollars."

"*Prevention of epidemics.*—The President of the United States is hereby authorized in case of threatened or actual epidemic of cholera or yellow fever, to use the unexpended balance of the sum appropriated by the joint resolutions approved September twenty-sixth and October twelfth, eighteen hundred and eighty-eight, and one hundred thousand dollars in addition thereto, or so much thereof as may be necessary, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same."

After a careful examination and consideration of the above paragraphs, I am of the opinion that the case you present is one in which the President of the United States is authorized to use so much of the unexpended balance referred to in the paragraph relative to "prevention of epidemics" as may be necessary in his opinion for the purpose indicated.

The \$50,000 appropriated by the clause relative to "quarantine service," is intended apparently for the ordinary expenditures of that service. You present a case which seems to require extraordinary expenditure, and it is one that is apparently, and it seems to me, quite clearly, within the scope and the intent of the clause providing for an expenditure made necessary to prevent the spread of epidemic diseases. At least it is one that addresses itself to the discretion of the President of the United States under such clause.

Very respectfully,

O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Customs Laws.—Accounts of Persons in the Revenue Service.

CUSTOMS LAWS.

Shellfish, such as oysters, Chinese abelones, etc., when prepared by drying or pickling, are entitled to free entry.

DEPARTMENT OF JUSTICE,

September 24, 1889.

SIR: Your communication of June 11, ultimo, asks an opinion upon the question "whether shellfish, such as oysters, Chinese abelones, lobsters, etc., when prepared by drying or pickling, are dutiable under the provision in schedule G., T. I. 283, for salmon and all other fish prepared or preserved, or are exempt from duty by the provision in the free list, T. I. 783, for shrimps or other shellfish," and calls my attention to decisions in 1883 (S. 5902 and 5905).

Upon an examination I agree with you that the principle of the decision of your Department under date of August 22, 1885 (S. 7080), is applicable to the shellfish mentioned in the previous decisions of your Department under date of September 13 and 18, 1883 (S. 5902 and 5905). I think, therefore, that the shellfish referred to are entitled to free entry, and accordingly concur with you in opinion and recommend a reversal or modification of such previous decisions, in compliance with chapter 136, section 2, (18 Statutes, 469).

Very respectfully,

O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ACCOUNTS OF PERSONS IN THE REVENUE SERVICE.

The Secretary of the Treasury has power, under section 161, Revised Statutes, to make a regulation which prescribes that the oaths to be taken by an officer of the Revenue Marine Service, or an officer or employé in any branch of the customs service, to the correctness of his account for pay or salary, as required by sections 1790 and 2693, Revised Statutes, shall be taken before some person authorized to administer oaths generally.

The fee paid by the officer or employé in such case for administering the oath does not constitute a proper charge against the United States, and if charged in his account should not be allowed in the settlement thereof.

Accounts of Persons in the Revenue Service.

DEPARTMENT OF JUSTICE,

September 24, 1889.

SIR: The two questions submitted by you for an opinion in your communication of May 13, 1889, have arisen upon Treasury Circular, No. 8741, dated March 21, 1888, which is as follows:

“TREASURY DEPARTMENT,
“OFFICE OF COMMISSIONER OF CUSTOMS,
“Washington City, D. C., March 21, 1888.

“*To the collectors and other officers of the customs:*

“The Solicitor of the Treasury has given an opinion under date of February 9, 1888, that an auditor or clerk in the customs service appointed as a deputy collector can administer only such oaths as the collector has authority to administer, and that the collector has no authority by law to administer oaths generally; and that the oath required of an officer of the Revenue Marine Service, or of any officer or employé in any branch of the customs service, which he is required to take to the correctness of his account for pay or salary as provided by sections 1790 and 2693 of the Revised Statutes, must be taken before some person authorized by law to administer oaths generally; and that a collector, deputy collector, auditor, or clerk for the customs service is not such a person. You will take notice of this opinion, and conform thereto.

“JOHN S. McCALMONT,
“*Commissioner of Customs.*

“Approved.

“C. S. FAIRCHILD,
“*Secretary.*”

These questions, as I gather them from your communication, are (1) whether the Secretary of the Treasury had the power to declare by regulation that the oaths required by law to be taken by an officer of the Revenue Marine Service, or an officer or employé in any branch of the customs service, to the correctness of his account for pay or salary, as provided by sections 1790 and 2693 of the Revised Statutes, must be taken before some person authorized by law to administer

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oaths generally; and that a collector, deputy collector, auditor, or clerk in the customs service is not such a person; and (2) whether in cases where an officer of the Revenue Marine Service, or an officer or employé in any branch of the customs service, is compelled to pay a fee to some officer for administering the oaths required by the said sections, the fee so paid may be lawfully repaid at the Treasury to the officer as a charge or expense that should be borne by the Government.

As there is no law requiring customs or revenue marine officers to administer oaths under sections 1790 and 2693, I have no difficulty in answering the first question in the affirmative, in view of section 161 of the Revised Statutes, which is as follows: "The head of each Department is authorized to prescribe regulations not inconsistent with law for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

It would hardly seem to admit of doubt that the regulation under consideration was within the powers conferred on the heads of Departments by section 161, for it is quite clear that a head of a Department has, under those powers, the right to say what duties the officers and clerks under him shall do or not do, so long as he does not go counter to any law.

I proceed, therefore, to consider the second question.

This question requires more attention. It seems not to have arisen earlier, because until the prohibition contained in circular 8741 went into effect, the oaths required by sections 1790 and 2693 were, as your communication states, administered by customs officers without charge. Indeed, even now in some revenue districts the oaths in question are still administered by revenue officers who have, by authority of some of the States, become qualified to administer oaths generally, and thus are not subject to the prohibition of circular 8741. In these cases no charge is made for administering the oaths, and so the question under consideration does not arise.

In other districts, however, where, under State law, holding an office under the United States constitutes a disqualification for holding at the same time a State office, the

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convenient arrangement mentioned is not practicable, and the oaths in question must be taken before some State officer who, not being an officer of the customs, charges a fee for the service, as in other cases.

It is not pretended that the Government has not paid the full amount of his salary to each officer who claims that the expense of making oath to his salary account should be repaid to him out of the Treasury. The whole question is that of the liability of the United States to make good the expense of the oath as something additional to the salary.

The sections of the Revised Statutes requiring these oaths are as follows:

“SEC. 1790. No officer or clerk whose duty it is to make payments on account of the salary or wages of any officer or person employed in connection with the customs or the internal-revenue service, shall make any payment to any officer or person so employed on account of services rendered or of salary, unless such officer or person so to be paid has made and subscribed an oath that, during the period for which he is to receive pay, neither he, nor any member of his family, has received, either personally or by the intervention of another party, any money or compensation of any description whatever, nor any promises for the same, either directly or indirectly, for services rendered or to be rendered, or acts performed or to be performed, in connection with the customs or internal revenue; or has purchased, for like services or acts, from any importer, if affiant is connected with the customs, or manufacturer, if affiant is connected with the internal-revenue service, consignee, agent, or custom-house broker, or other person whomsoever, any merchandise, at less than regular retail market prices therefor.”

“SEC. 2693. No account for the compensation for services of any clerk, or other person employed in any duties in relation to the collection of the revenue, shall be allowed, until such clerk or other person shall have certified, on oath, that the same services have been performed, that he has received the full sum therein charged to his own use and benefit, and that he has not paid, deposited, or assigned, or contracted to pay, deposit, or assign, any part of such compensation to the use of any other person, or in any way, directly or indirectly, paid or given, or contracted to pay or give, any reward or

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compensation for his office or employment, or the emoluments thereof."

In my opinion the precedents and the practice of the Government are against the validity of such claims.

Like its exemption from suit, the right of the United States to be exempt from liability for costs of all sorts and for interest inheres in its character of sovereign, and is not to be found in any provision of law. Said Chief-Justice Marshall in *United States v. Barker* (2 Wheat, 395), "The United States never pay costs." And in *Angarica v. Bayard* (127 U. S. R., 260) will be found collected the authorities on which the principle that the United States is not liable for interest is recognized in this latest case on the subject.

In bringing claims against the Government before its accounting officers, and in transacting business generally in the Executive Departments, the citizen is continually called on to incur expenses in order to meet the requirements of official routine; yet it was never heard that such expenses were recognized as proper demands against the Government; and the long acquiescence of the public and of Congress in the practice of requiring the claimant to meet all the expenses connected with the presentation and payment of his claim may well be regarded as conclusive against all claims of that character which do not rest on some special law.

In 1885 this subject received some attention in a case before the First Comptroller of the Treasury, and while that officer held that *under certain legislation* the cost of making oath to pay accounts should be paid at the Treasury in certain special cases, he also recognized as firmly established the general rule that such allowances should not be made, and at the same time adduced important official evidence to show the existence of this general practice. (6 Lawrence's Decisions, 99.)

But shortly afterwards this ruling by the Comptroller became the subject of consideration by a committee of the House of Representatives, appointed to investigate certain charges. In their report the committee held that the Comptroller was in error in the case mentioned, to allow an exception from the general rule that Government does not pay costs of any de-

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scription, upon the idea that Congress had authorized the exception. And as the question under discussion depends somewhat on official custom, it may tend to throw light on the subject to know what the committee said on this point. Accordingly, I make the following quotation from the report:

"It is, in the opinion of the committee, clearly error to hold that one who has a claim against the Government is not acting for his own benefit when he makes the proof necessary to secure its payment. That this proof is in the Department regarded as a part of the voucher of the Government does not divest it of its original character as *proof*. If the principle is once established that the Government is to pay not only its debts, but all the expenses of proving them, then it would have to pay all the expenses of litigation against it, including the fees and commissions of attorneys and all other legitimate costs that the creditor may choose to incur. This is clearly wrong. Nor does the fact that the expense of proving the claim lessens the per diem of the officer alter the case. He accepts the office knowing that this expense is to be borne, and it is a part of the contract. The payment by the Government of such expenses in other cases does not make the practice right, but rather shows the extent to which this erroneous principle has extended. It is fair to say that Judge Lawrence found the practice of paying this class of claims to exist when he came into the office, dating back probably to 1876, and that after considering the matter he decided that they should be paid, and cites authorities." (6 Lawrence's Decisions, 286.)

I do not see that there is anything in the nature of the pay accounts required to be verified by oath by sections 1790 and 2693, which enables me to distinguish them in principle from the great mass of claims and demands which from the beginning of the Government down have been held subject to the rule that the United States pays no costs of any kind incurred by claimants in submitting their claims or demands for payment.

I have the honor to be, sir, your obedient servant,
O. W. CHAPMAN,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Patents for Inventions.

PATENTS FOR INVENTIONS.

A naval officer or employé of the Government at a navy-yard, who has invented an article for use in the naval service and patented it, if the invention does not relate to a matter as to which he was specially directed to experiment with a view to suggest improvements, is entitled to compensation from the Government for the use of such article, in addition to his salary or pay as such officer or employé.

It makes no difference that the invention consists of an improvement upon an article already patented, and that when the improvement was patented the officer or employé was assigned to the duty of superintending for the Government the manufacture of the article improved upon.

The Secretary of the Navy can not legally contract with the patentee for the purchase of his patent, or for a license to use it, under an appropriation limited to the purchase of material and the employment of labor in the manufacture of such article out of it.

DEPARTMENT OF JUSTICE,
October 4, 1889.

SIR: Your communication of August 24 ultimo submits for an opinion the following questions:

"(1) Whether an officer of the Navy or a civil employé at a navy-yard, who has invented, or improved and patented, under the circumstances hereinbefore stated, any article or appliance for use in the naval service, is entitled to receive from the Government, in addition to his salary or pay as such officer or employé, compensation for the use by this Department of such invention?

"(2) Whether an officer of the Navy or a civil employé at a navy-yard who, while assigned to the duty of superintending the manufacture of a patented article or appliance, makes and patents an improvement therein, is entitled to receive from the Government, in addition to his salary or pay as such officer or employé, compensation for the adoption or use by this Department of such improvement?

"(3) If you shall be of opinion that such officer or employé is, under the circumstances stated in either or both of the preceding questions, entitled to compensation for the use or adoption by the Government of such patented invention, could this Department legally contract with such officer or employé for the purchase of such invention, or for the pay-

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ment of royalty thereon, from an annual appropriation providing for the furnishing or manufacturing of an article or appliance used in the naval service and covered by such patented invention, or must such purchase or payment be provided for by an appropriation explicitly setting forth that it is for such patented invention?"

In connection with these questions your communication states:

"It will be seen, from the correspondence referred to, that Lieutenant Dunn has submitted to the proper bureau of the Department a proposal to sell to the Government the absolute right to manufacture and use in the naval service such anchors of his patent as may be required, or to permit the same to be used under agreement for the payment of royalty thereon; that at the time he obtained a patent upon his invention, Lieutenant Dunn was on duty in the Bureau of Equipment and Recruiting in this Department, which Bureau is charged with the selection and furnishing of anchors for the Navy; that he was not, while attached to said Bureau, especially employed to make experiments with a view to suggest improvements in anchors, nor assigned to the duty of making or improving them; that the fees and expenses of obtaining the letters patent were paid by him; that no expense was authorized or facilities furnished by the Bureau to aid him in making or perfecting his invention; and that with the exception of determining the number of anchors to be carried by each of the new ships, Lieutenant Dunn's duties in the Bureau were not connected with the work of supplying anchors to vessels of the Navy."

It is also stated therein that other cases are now under consideration in the Navy Department involving the same questions as arise in Lieutenant Dunn's case, and presenting substantially the conditions of fact on which that case rests.

It is important to observe that the Supreme Court of the United States has settled the point that the United States is as much bound to respect the rights secured to a patentee by his letters patent as an ordinary person, even in cases where the invention covered by the patent could be useful only in the administration of Government; as, for instance, "explo-

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sive shells, rams, and submarine batteries to be attached to armed vessels." (*James v. Campbell*, 104 U. S. R., 356; *United States v. Palmer*, 128 U. S. R., 262; *Hollister v. Benedict Manufacturing Company*, 113 U. S. R., 60.)

It is also to be noted that the same court has decided that a person in the military service of the United States has a right to patent an invention made by him and relating to the branch of the service to which he belongs; and that the United States has no right to use such invention without making proper compensation, as in other cases where the property of the citizen is taken and used for public purposes. (*United States v. Burns*, 12 Wall., 246; *United States v. Palmer*, 128 U. S. R., 262.)

The only qualification of this principle the court makes is, that the invention of a person in the Government service shall not relate to a matter as to which he was specially directed to experiment with a view to suggest improvements. In such cases the fruits of the inventor's ingenuity belong to the Government. (*United States v. Burns*, *supra*; and see also *Agacam Co. v. Jordon*, 7 Wall., 603). But no one of the cases referred to in your communication falls within this qualification of the general principle.

It follows, therefore, that an officer of the Navy or a civil employé of the Government at a navy-yard, who has made an invention and patented it under the circumstances stated in your communication, can demand compensation from the Government for the use of such invention, in addition to his salary or pay as such officer or employé.

Nor does it, in my opinion, make any difference in the application of the general principle that the invention consists of an improvement upon a patented thing, and at the time the improvement was patented the officer was assigned to the duty of superintending for the Government the manufacture of the patented thing improved upon.

It follows, then, that the first and second questions should be answered in the affirmative.

This affirmative answer to the first and second questions makes it necessary to consider the remaining question.

In considering the third question we must bear in mind section 3718, and the several consecutive sections that follow

Railway Mail Service—Appointment.

it and provide in what way supplies for the Navy may be purchased or contracted for.

If the patentee of an article is the lowest bidder for furnishing that article, the Secretary of the Navy may, it would seem clear, accept his proposal and make a contract with him. So if the article needed be one for which the Secretary of the Navy may negotiate without advertising for proposals, it would seem that the Secretary may contract with a patentee of the article to furnish the needed supply.

This, I apprehend, he may do under any general appropriation that is applicable to the subject contracted for.

But however desirable Lieutenant Dunn's improvement may be, Congress has not, so far as I am able to discover, appropriated any money for buying either his patent right or a license to use it. No such power can, in my opinion, be deduced from the simple power to buy iron and employ labor to make it into anchors.

This disposes of the third question.

As the law requires me to act upon a case stated, and not upon mere evidence, I have confined myself to the statement of facts contained in your communication, and have not looked into the correspondence that accompanied it, which I return herewith as requested by you.

I have the honor to be, sir, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

RAILWAY MAIL SERVICE—APPOINTMENT.

T. was appointed a railway postal clerk by the Postmaster-General on April 29, 1889, without having undergone a civil-service examination (none being then required for such appointment), but he did not take the oath of office and enter upon its duties until May 18, 1889. In the mean time, namely, on May 1, 1889, civil-service rules for the Railway Mail Service went into effect, requiring an examination thereunder as a preliminary to making an appointment like the above: Held that T. was legally appointed on April 29; that his appointment was complete on that date, although he did not qualify by taking the oath of office until afterwards; and that no examination under the civil-service rules was required in his case.

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DEPARTMENT OF JUSTICE,
October 14, 1889.

SIR: I have the honor to acknowledge the receipt of your request for an opinion from this Department upon a question submitted by the honorable the Civil Service Commissioners Theodore Roosevelt and Hugh S. Thompson, under date of September 24, 1889.

The letter of the Commissioners and the letter inclosed therewith of the General Superintendent of the Railway Mail Service to the Hon. John Wanamaker, Postmaster-General, dated July 9, 1889, present the following facts:

On April 29, 1889, one J. M. Taylor was appointed a railway postal clerk. The Superintendent's letter asserts—and the facts thus asserted seem to be accepted by the Commissioners—that his "appointment was made in the usual way upon April 29, 1889, and upon that day the appointment papers were regularly made up, *executed*, and *recorded*, and, as is customary, were at once forwarded to the Superintendent of the fifth division, and *notice as well given Taylor*. There was nothing unusual in the method observed in the making out of the appointment papers, neither was there anything out of the usual course in connection with the forwarding of the appointment and the notice to the appointee." This appointment was approved by the signature of the First Assistant Postmaster-General on April 29; Taylor, however, did not take the oath of office until May 18, 1889.

It so happens that on March 11, 1889, the President issued the following order:

"Whereas civil-service rules for the Railway Mail Service were approved January 4, 1889, to go into effect March 15, 1889; and

"Whereas it is represented to me by the Civil-Service Commission, in a communication of this date, that it will be impossible to complete arrangements for putting such rules into full effect on said date, or sooner than May 1, 1889; it is therefore

Ordered, That said railway mail rules shall *take effect May 1, 1889*, instead of March 15, 1889; provided that such rules

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shall become operative and take effect in any State or Territory as soon as an eligible register for such State or Territory shall be prepared, if it shall be prior to the date above fixed."

My attention is also called to section 7 of the civil-service act of January 16, 1883, and General Rule III, section 1.

Upon this state of facts the question is asked whether Mr. Taylor was legally appointed on April 29, so that his examination under the civil-service rules is not required, or whether the time of taking the office and entrance upon duty is decisive as to the requirement of an examination.

It will be noticed that said section 7 and said General Rule III did not "take effect" until May 1, 1889, under the terms of the President's order of March 11, 1889.

The law as to Taylor's appointment in force down to May 1, 1889, was section 4025 Revised Statutes, which reads:

"The Postmaster General may appoint clerks for the purpose of assorting and distributing the mail in railway post-offices, each of whom shall be paid out of the appropriation for transportation of the mail a salary at the rate of not more than one thousand four hundred dollars a year each to the head clerks, nor more than one thousand two hundred dollars a year each to the other clerks."

Under this section the Postmaster-General had the right on April 29 to appoint Taylor in the way he was appointed. His appointment at the time it was made was, therefore, in every sense legal and valid; and it only remains to see whether the mere fact that he did not take the oath required until after May 1 in any way affected the completeness and finality of that appointment.

The Supreme Court of the United States seems to have settled a principle which is conclusive upon this question. In the case of the *United States v. Le Baron* (19 How., 73), the question was considered whether a deputy postmaster's appointment was in force at the time of his giving his bond. It appeared that his nomination had been confirmed by the Senate, and his commission had been signed by President Taylor, who shortly thereafter died, such commission not having been delivered to him at the time of executing his bond. The court held—

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"When a person has been nominated to any office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts, then, become precedent to the complete investiture of the office, but they are to be performed by the appointee, not by the Executive. All the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions his title to enter on the possession of the office is also complete. The transmission of the commission to the officer is not essential to his investiture of the office. If by any inadvertence or accident it should fail to reach him, *his possession of the office is as lawful as if it were in his custody.* * * * It is of no importance that the person commissioned must give a bond and *take an oath* before he possesses the office under the commission; nor that it is the duty of the Postmaster-General to transmit the commission to the officer when he shall have done so."

See also the case of *Marbury v. Madison* (1 Cranch, 137), in which the court remarks :

"The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him. *The right to the office is then in the person appointed; and he has the absolute, unconditional power of accepting or rejecting it.*"

No material distinction is apparent between the case of an appointment by the President, after confirmation by the Senate, and an appointment by the Postmaster-General. The question in each case hinges upon the time when the appointment is complete; and, under the authority of the above cases, the appointment of Taylor under the facts stated must have been complete before May 1, 1889, the day when the civil service rules took effect.

I am therefore constrained to hold that Mr. Taylor was legally appointed on April 29th under the laws of the United

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States, and that the fact that he did not take the oath of office until after May 1st is immaterial upon the question of his right to hold the office to which he was appointed on April 29th.

The papers by you transmitted are herewith returned.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The PRESIDENT.

Approved:

W. H. H. MILLER.

ATTORNEY-GENERAL.

Where no actually existing case was presented, but the call apparently was for an opinion in advance as to what would in the future be held upon indefinite and varying facts, the Attorney-General returned the papers, declining to give an opinion on the matter submitted.

DEPARTMENT OF JUSTICE,
October 25, 1889.

SIR: I have the honor to acknowledge the receipt of your communication of October 17, 1889, relating to "the status of officers and men who served in what is known as the Quartermaster's Brigade or Quartermaster's Volunteers," etc., with inclosures.

I am unable to see how this Department has any right to pass upon the suggestions contained therein. They do not seem to present any actually existing case, arising in the administration of your Department. They apparently call for an opinion in advance as to what this Department would hold in the future upon indefinite and varying facts. In such cases the Department has uniformly declined to give opinions. I take the liberty of quoting from a late opinion of this Department, which will serve to show how uniformly this rule has been adhered to, and the reasons therefor, as follows:

"From this statement it appears that the question submitted does not spring out of any present, actually existing case, 'arising in the administration of your Department.' It is a question in a hypothetical case, and one indeed which

Attorney-General.

may never arise, and calls in advance for an opinion as to what the Department would hold in the future upon a somewhat indefinite state of facts.

"That being the case, it is respectfully submitted that this Department is not permitted, by statute or precedent, to give an opinion upon it.

"Allow me first to call your attention to Revised Statutes section 356, as bearing generally upon the question, which reads: 'The head of any Executive Department may require the opinion of the Attorney-General upon any question of law *arising in the administration of his Department.*'"

"Next, I respectfully refer you to the following extracts from opinions of this Department, which will serve to show how uniformly it has adhered to the positions herein indicated:

"'It has always been the rule of this office to give advice only in *actual cases*. * * * It is impossible to reply to mere speculative points or *supposed cases*.' (9 Opin., 82.)

"'It is not the duty of the Attorney-General to give an opinion on a question * * * with which the Government has no *present concern*.' (9 Opin., 355.)

"'The Attorney-General will not give an opinion on an important legal question when it is not practically presented by an *existing case before a Department*.' (9 Opin., 421; 10 Opin., 50.)

"'The opinion of the Attorney-General may be required on questions of law arising in the actual administration of a Department, but not upon *hypothetical cases merely*.' (13 Opin., 531.)

"'It is not the duty or practice of the Attorney-General to officially answer abstract or *hypothetical* questions of law.' (13 Opin., 568.)

"Later opinions fully harmonize with the above. Permit me also to quote the following from 13 Opin., 531, as giving a *reason* for the rule:

"'You will readily perceive the inconvenience of giving, upon a hypothetical case, an opinion which, upon the consideration of an actual case, might require modification on account of circumstances not imagined, and therefore not considered in the preparation of the opinion.'

CIVIL SERVICE—RESIGNATION AND RE-APPOINTMENT.

"To attempt in advance to settle such questions, in the words of another eminent Attorney-General, is 'to anticipate trouble' (9 Opin., 421), and it may well be added to promote trouble."

If you will examine the authorities cited above, I think you will see that the rule should be maintained.

The papers transmitted are respectfully returned herewith, with the suggestion that if you have the actual case of any clerk applying for re-instatement, and will present it with a statement of the agreed facts (see 12 Opin., 206; 10 Opin., 267; 3 Opin., 30, and many opinions to the same effect) and the question of law you desire answered, this Department will cheerfully submit its opinion thereon.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

W. H. H. MILLER.

CIVIL SERVICE—RESIGNATION AND RE-APPOINTMENT.

F., a clerk in the War Department, resigned June 30, 1888, and on November 2, 1888, was re-appointed to a clerkship in the same Department on a certificate for re-instatement given by the Civil Service Commission under Departmental Rule X, but failing to avail himself of this opportunity to re-enter the service, the last-mentioned appointment was canceled January 23, 1889. On August 13, 1889, the Secretary of War requested that F. be again certified by the Commission for reinstatement, but the Commission on August 25, 1889, declined to issue a certificate, on the ground that he had been separated from the service more than a year, and was not eligible for re-appointment under said rule: *Held* that the decision of the Commission, namely, that a second certificate for re-appointment could not issue to F. because he had been separated from the service for more than a year, was in accordance with Rule X.

DEPARTMENT OF JUSTICE,
October 26, 1889.

SIR: I have the honor to acknowledge the receipt of your request for an opinion upon the letter and inclosures forwarded to you by the Hons. Charles Lyman and Hugh S.

CIVIL SERVICE—RESIGNATION AND RE-APPOINTMENT.

Thompson, Civil Service Commissioners, under date of October 16, 1889.

The letter of the honorable Commissioners does not give the necessary statement of a case upon which to base an opinion, but, from a careful examination of the inclosures, the essential facts appear to be as follows:

Louis M. Fitch "resigned his clerkship" in the War Department "June 30, 1888." "He was re-appointed November 2, 1888," upon the "certification" of the Commission; "but as he failed to avail himself of this opportunity to *re-enter* the service, his appointment was canceled on January 23, 1889."

On August 13, 1889, the Secretary of War requested that Mr. Fitch's "name be certified for re-instatement."

To this request for a *second* certificate, the Civil Service Commission, through its president, on August 15, 1889, replied as follows, viz:

"As Mr. Fitch did not appear and take the oath of office upon his re-appointment in November, 1888, and as that appointment was therefore never consummated, but was canceled on January 23, [28] 1889, and more than one year having elapsed since the date of Mr. Fitch's *separation* from the service, namely, on June 30, 1888, he is not eligible for re-appointment under Departmental Rule X, not having served in the Army or Navy during the late war of the rebellion. Certificate for his re-appointment can not, therefore, issue."

The letter of the honorable Commissioners to the President, dated October 16, 1889, says:

"The Civil Service Commission has the honor to submit herewith the request of the Secretary of War for a certificate for the re-instatement in the War Department, under Departmental Rule X, of Mr. Louis M. Fitch, with accompanying papers:

"The Commission declined to issue the certificate, on the ground that Fitch had been more than one year *separated from the service*, and so informed the Secretary of War, under date of August 15, 1889 (a copy of letter inclosed), and in view of the opinion of the Attorney-General in the matter of the appointment of J. M. Taylor as a railway postal clerk, the Commission has been led to doubt the correctness of this action. It has therefore been thought best to submit the

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case to the President, with the request that the opinion of the Attorney-General be obtained upon the question whether the proceedings had in Fitch's case in November, 1888, constituted an appointment, in view of the fact that he *failed to take the oath of office and enter upon duty*, and the subsequent *cancellation* of the appointment by the Department."

Departmental Rule X is as follows:

"Upon requisition of the head of a Department the Commission shall certify for reinstatement in said Department, in a grade requiring no higher examination than the one in which he was formerly employed, any person who *within one year next preceding* the date of the requisition *has*, through no delinquency or misconduct, *been separated from* the classified service of that Department, *provided* that certification may be made, subject to the other conditions of this rule, for the reinstatement of any person who served in the military or naval service of the United States in the late war of the rebellion and was honorably discharged therefrom, without regard to the length of time he has been separated from the service."

Under the phraseology of this rule it will at once be seen that the question here is not "whether the proceedings had * * * constituted an *appointment*," etc., but whether Mr. Fitch had "*been separated* from the classified service of that (the War) Department" "*within one year next preceding* the date of the requisition," which date was August 13, 1889.

It is conceded that Mr. Fitch resigned his clerkship June 30, 1888, and hence on that day he "*separated from the service*." The separation which thus began to run on the day he resigned must have continued until he did actually re-enter the service. "*A certificate for reinstatement*" as per Rule X did not put him in; a mere "*appointment*" under it did not put him in. These, together, gave him a *right to go in*, which until canceled or revoked he could accept or refuse. But it so happens that his appointment was canceled before acceptance and before any service under it, and at a time when the Secretary of War had full authority to so cancel it. If at any time before such cancellation Fitch had complied with the necessary formalities and had entered the service he would *then* have been *re-instated*. But the Sec-

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retary of War asserts, and the Commission agrees, that he "failed * * * to re-enter the service" prior to such cancellation. The mere fact that he had a *right* to go into the service did not put him in; and if he did not *get in* at the time indicated, he could not thereafter have "*been separated*" from it within the wording of said rule.

These considerations show clearly a very wide distinction between this case and the case of J. M. Taylor, referred to in the Commissioners' communication. Without alluding to differences in the wording and the application of the law governing the two cases, it is sufficient here to say that in the Taylor case the appointment was not canceled at any time, either before or after acceptance and service, while in this case the appointment was canceled before either acceptance or service. A careful reading of the opinions in *Marbury v. Madison* (1 Cranch, 137) and *United States v. Le Baron* (19 How., 73), cited by this Department in Taylor's case, will show the importance of this distinction.

It is said that Mr. Fitch, prior to June 30, 1888, had been for many years an efficient clerk, that he resigned and was unable to re-enter by reason of impaired health, etc. I need not say that while these considerations appeal to an exercise of all discretion in his favor, they do not bear upon the question submitted as to what is the *law*.

The decision of the honorable Commission, rendered August 15, 1889, to the effect that a *second* certificate for reappointment could not issue to Mr. Fitch, because he had been separated from the service for more than a year, seems to be in accordance with Rule X.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The PRESIDENT.

Approved:

W. H. H. MILLER.

Inspectors of Customs.

INSPECTORS OF CUSTOMS.

Inspectors of customs are not entitled to receive a per diem compensation under section 2733, Revised Statutes, for periods during which they are absent from duty on account of sickness or for any other cause. The fourth section of the act of March 3, 1883, chapter 128, does not affect the provisions of said section 2733 regulating the compensation of such inspectors.

DEPARTMENT OF JUSTICE,
October 31, 1889.

SIR: Your communication of the 26th March, ultimo, taken in connection with the report of the Commissioner of Customs which accompanies it, presents for opinion the question whether inspectors of customs can receive compensation for any time during which they are absent from duty on the ground of sickness.

These officers, like clerks and employés generally, hold their positions subject to removal at the pleasure of the appointing power.

By section 2733, Revised Statutes, it is provided that "each inspector shall receive, for *every day he shall be actually employed in aid of the customs*, three dollars." * * *

By the fourth section of the act of March 3, 1883 (22 Stat., 563) it is provided: "That hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employés, of whatever grade or class, in their respective Departments, not less than seven hours of labor each day, except Sundays: *Provided*, That the heads of the Departments may by special order, stating the reason, further extend or limit the hours of service of any clerk or employé in their Departments respectively, but in case of an extension it shall be without additional compensation; and all absence from the Departments on the part of said clerks or other employés in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year except in case of sickness, shall be without pay."

It may be proper to say also that section 2733, already quoted in part, further provides that the compensation of

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persons employed as "*occasional inspectors*" shall be \$3 a day while "*actually employed*" in aid of the revenue.

This further provision of section 2733 is referred to as showing that the law authorizes the appointment of occasional temporary inspectors as well as inspectors, who are, as to official tenure, on the footing of the regular clerks and employés of the Government; and it appears from the letter of the Commissioner of Customs accompanying your communication that it has been the invariable rule in the Treasury Department not to allow occasional temporary inspectors pay during sickness or for any other time during which they could not be properly said to be "*actually employed*" in aid of the revenue. But it also appears that the view of the Treasury Department has not been uniform as to the meaning of the law with regard to the compensation of the regular or permanent inspectors, although the law on that subject has been substantially the same ever since the act of August 4, 1790, section 2 (1 Stat., 172).

Recurring to the letter of the Commissioner of Customs, it appears that on May 2, 1833, the then Secretary of the Treasury, Mr. McLane, instructed Samuel M. Swartwout, then collector of customs at New York, that "when an inspector, other than an occasional inspector, is taken ill while on duty, and it is made to appear to the satisfaction of the surveyor that he is unable through illness to perform his duty, his allowance may be continued during such absence unless it shall appear that the disqualification is of a permanent nature."

So far as the Commissioner has been able to gather from the "traditions" of the Treasury Department, it appears that the practice of the Department was in accordance with these instructions of Secretary McLane until January 27, 1885; and this is confirmed by section 636 of the general Treasury Regulations of 1857 and article 1490 of the general Treasury Regulations of 1884.

On January 27, 1885, Mr. Attorney-General Brewster gave an opinion that Thomas Whelan, an inspector of customs, was not entitled to pay for the time during which he had been suspended from duty, inasmuch as Whelan could not have been "*actually employed*" during such suspension "*in aid of*

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the customs," and thereupon the then Secretary, Mr. McCulloch, made an order conforming the practice of the Department to this opinion.

In some way, which does not clearly appear, the opinion of Mr. Attorney-General Brewster was reviewed by the then Solicitor of the Treasury, who held that inspectors could, after assignment to duty, claim pay for Sundays and other holidays, and while performing clerical duty, or awaiting directions, and "while confined by temporary sickness incurred while on duty," referring with approbation to the opinion of Mr. Secretary McLane. On another occasion, in the same year, the same officer gave an opinion that the rule established in the above quoted act of March 3, 1883, applied to inspectors.

But these views are, perhaps, not to be regarded as intended to be in conflict with the opinion of the Attorney-General; first, because the case before the Attorney-General was one of an inspector's *actual suspension from duty*; and secondly, because the learned Attorney-General does not appear to have considered the act of March 3, 1883, in connection with section 2733, Revised Statutes.

There is certainly a palpable distinction between an inspector's suspension from duty by the appointing power and his absence from duty caused by sickness. Whether that distinction is recognized by the law is a question that does not appear to have been passed upon by any of my predecessors.

In fixing the compensation of inspectors of customs the law (Rev. Stats., sec. 2733) does not say, as we have seen, that an inspector shall receive \$3 a day merely, but \$3 "*for every day he shall be actually employed* in aid of the customs." This language is very different from that usually employed by Congress in determining the compensation of public officers, even when such compensation is by the day. For instance, section 2650, Revised Statutes, directs that certain special Treasury agents shall receive "a compensation of \$10 per day," and others "a compensation of \$8 per day," and others "a compensation of \$6 per day," and others "a compensation of \$5 per day," without saying while actually employed, or its equivalent. Something like the language used

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in section 2733 may be found in section 4017, Revised Statutes, authorizing the Postmaster-General to employ special agents, and providing that they shall receive a stated salary each, and be allowed for traveling and incidental expenses, "*while actually employed in the service, a sum not exceeding \$5 a day.*"

It is plain, from the reading of this section, that Congress intended to establish by it a distinction between the two cases of a special agent in the service of the Post-Office Department and drawing an annual salary, and a special agent as "*actually employed*" in that service, and for that reason entitled to a *per diem* allowance.

There is a palpable distinction between an officer who is at his post ready for duty, and one who is away from his post, whether with leave or on account of sickness. In the former case he is "*actually employed*" in the public service, while in the latter he is an employé, but not for the time being "*actually employed*" in that service.

The same sort of distinction is made in section 824, Revised Statutes, between a district attorney's "*necessary attendance*" on court and his mere "*attendance*." When the court sits at his place of residence the district attorney gets only a *per diem* for "*necessary attendance*," but when the court sits elsewhere he receives his *per diem* for "*attendance*" *for each day of the term.*

I think, therefore, that when Congress declared that an inspector of customs should receive a *per diem* for "*every day he shall be actually employed in aid of the customs,*" it did not mean that he should continue to draw his *per diem* when kept from his post even by sickness, or, as Mr. Brewster held, when suspended from duty, or when away on leave of absence. In none of these instances can it be said that the inspector is "*actually employed*," without ignoring a distinction which Congress obviously intended to establish.

So much for the legislation as it stood when the act of March 3, 1883 (*supra*), went into operation.

The next inquiry is, whether that act had any effect, and, if any, what effect, on section 2733, Revised Statutes, regulating the compensation of inspectors of customs.

It will be remembered that the act of 1883, after declaring

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that seven hours of labor, daily, should be required of all clerks and other employés in the several Departments, Sundays and other public holidays excepted, goes on to say, in a proviso, that "all absence from the Departments on the part of said clerks or other employés in excess of such leave of absence as may be granted by the heads thereof (*i. e.*, of Departments), which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay;" not saying, it will be noticed, that a leave of thirty days shall be granted in all cases or in any case, but putting a limitation of thirty days on such leave in any case *where it is allowable under existing laws*.

It does not seem to be open to doubt that this is a general, comprehensive law, applicable to all the Departments of the Government, and conforming to and sanctioning the long practice of granting employés in the civil service a leave of absence of thirty days per annum, whether on account of sickness or otherwise.

On the other hand, as I think has been satisfactorily shown, the legislation embodied in section 2733 should be regarded as exceptional and particular in character, and as lying entirely outside the purview of the fourth section of the act of March 3, 1883 (*supra*), because of its exceptional and particular nature. This is certainly true, unless the act of 1883 impliedly repeals section 2733 as to the point under consideration.

The rule in relation to this subject, as quoted by the Supreme Court in *Ex parte Cow-Dog* (109 U. S., 570, 571), is that "a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." And the same court says in the same case, adopting the language of Vice-Chancellor Wood in *Fitzgerald v. Champenys*, that the reason of the rule is "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act, when it makes no special mention of its intention so to do." In addition to the case just cited,

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the following cases will be found instructive, also, on this head, namely, *State v. Stoll* (17 Wall., 431); *Williams v. Pritchard* (4 T. R., 2); *Brown v. County Commissioners* (21 Pa. St., 37); *Rounds v. Waymart Borough* (81 Pa. St., 395), a very strong case; *Blain v. Bailey* (25 Ind., 165); *Sedgw. Con. & Stat. Law*, 123, 124.

The same conclusion is strongly confirmed by the universal rule that repeals by implication are not favored, and that a former law is not to be affected by a subsequent one which does not refer to it, "if by any reasonable construction they can be made to stand together" (*United States v. Langston* 118 U. S. R., 389, 393. See also *Chew Heong v. United States*, 112 U. S. R., 536, and cases cited.)

I repeat, then, in conclusion, that inspectors of customs can not receive a per diem compensation under section 2733 "for periods of absence from duty on account of sickness or otherwise."

Very respectfully, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

COMPENSATION FOR DISBURSING PUBLIC MONEY.

By the act of March 3, 1875, chapter 130, it was provided that the money appropriated for the erection of the building for the Departments of State, War, and Navy should be expended under the direction of the Secretary of War; and in March, 1877, C. (then a lieutenant-colonel in the Corps of Engineers), by order of the Secretary of War, took charge of the construction of the building and continued in charge thereof until May 31, 1888, when the building was completed. From July 1, 1878, until May 31, 1888, by direction of the Secretary of War, C. disbursed the appropriations made from time to time for the building; and for this service he claims compensation at the rate of three-eighths of 1 per cent. upon the amount of money disbursed by him: Held, upon consideration of sections 1153 and 3654, Revised Statutes, and the act of March 3, 1875, chapter 131, that the claim is controlled by the provisions of section 1153, Revised Statutes, and is not allowable thereunder.

DEPARTMENT OF JUSTICE,
November 9, 1889.

SIR: I have the honor to acknowledge the receipt of a communication from the Hon. George S. Batcheller, Acting Sec-

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retary, under date of October 22, 1889, transmitting, with inclosures, "an opinion of the Solicitor of the Treasury on the application of Brig. Gen. Thomas Lincoln Casey, Chief of Engineers, U. S. Army, for allowance of compensation for disbursing moneys appropriated for the construction of the building for the State, War, and Navy Departments," and asking whether this Department "concurs in the views expressed therein touching the question at issue."

The material facts appear to be, that by an act approved March 3, 1871 (16 Stat., 494), the sum of \$500,000 was appropriated by Congress for the construction of a building for the State, War, and Navy Departments. The construction of the building was commenced under the direction of the Secretary of State, and during its progress from July 1, 1871, to July 1, 1878, the money appropriated "for the work was disbursed successively by certain Department clerks." But in 1875 the clause making the appropriation provided that the money should "be expended under the direction of the War Department," and on March 3, 1877, General Casey (then lieutenant-colonel Corps of Engineers) was ordered by the Secretary of War to take charge of the construction of the building. In obedience to this order General Casey entered upon that duty and continued in charge of such construction until the completion of the work, May 31, 1888.

On June 17, 1878, and while "engaged about the execution" of this work, he addressed the following application to the then Secretary of War :

"SIR: In order to conform to the provisions of section 1153, Revised Statutes, I have most respectfully to request that the disbursement of the fund pertaining to the State, War, and Navy Department Building be placed in my hands to date from July 1, 1878.

"The present disbursing agent, so far as I am informed, has performed his duty with credit, but the language of the statute would seem to be imperative as to the duty which should devolve upon me, the superintending engineer of this public work."

This communication was referred June 20, 1878, by the Secretary of War to the Judge-Advocate-General for an

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opinion thereon. The Judge-Advocate-General, on June 22, 1878, replied, among other things, as follows:

"But, in view of the general terms and application of the rule set forth in this section (sec. 1153, Rev. Stat.), and of the fact that it is there expressly declared that the engineer officer shall be entitled to no additional compensation for making the disbursement, I can not but be of opinion that it was the intention of Congress that this rule should be followed, and any commissions which would otherwise be paid by the United States be thus saved, except in cases where the Secretary of War, by the authority of law and upon sufficient public grounds, might properly assume a different course.

"This view is fortified by the consideration that such a provision as that an appropriation 'shall be expended under the direction of the Secretary of War' is not special or unusual, but has been quite common for many years past in the acts appropriating funds for works intended to be supervised by engineer officers; and further, that, as I am informed, *the expending of the appropriations in such cases has habitually been devolved upon the officer in charge, in compliance with the enactment of 1838, now contained in the section indicated of the Revised Statutes.*

"It is therefore my conclusion that, unless the public interests clearly make it desirable, the Secretary of War would hardly be warranted in excepting the present case from the operation of the general rule prescribed in section 1153, Revised Statutes, and thus incurring a public charge which that enactment was apparently designed to dispense with."

Thereupon, and on June 27, 1878, the Secretary of War gave the following direction:

"The Secretary of War directs that Colonel Casey assume charge of the disbursement of the money upon the new State, War, and Navy Department Building."

Under such order, from July 1, 1878, until May 31, 1888, General Casey disbursed the appropriations as they were made from year to year, he all the time *having charge of the construction of the building.*

On December 21, 1888, General Casey presented to the

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First Comptroller of the Treasury the following statement of account against the United States :

The United States to Brig. Genl. T. L. Casey, Chief of Engineers, Dr.

1888. Dec. 21. For compensation under the 4th section of the act of March 3, 1875, for disbursing moneys appropriated for and expended in the construction of the public building known as the State, War, and Navy Building, in the city of Washington, D. C., between the 1st day of July, 1878, and the 31st day of May, 1888, both inclusive, said disbursements amounting to \$4,322,273.81, as is shown by my accounts for the same filed in the Treasury Department, at three-eighths of 1 per cent. upon said disbursements, \$16,208.52.

After some correspondence between the parties the Comptroller finally, on February 9, 1889, decided, for reasons stated in his letter of that date, that he was not "authorized to fix and allow the same."

General Casey, on July 9, 1889, presented the matter to the Secretary of the Treasury, who referred the communication to the Solicitor of the Treasury for an opinion, etc.

On August 27, 1889, the Acting Solicitor rendered his opinion to the effect that "General Casey is entitled to recover a fair and reasonable compensation within the limit of the act of March 3, 1875, for the disbursements made by him in the construction of said building by virtue of his appointment by the Secretary of War."

After a careful examination of this opinion, in the light of the facts hereinbefore stated and of the statutes applicable, I find my judgment forced into agreement with the opinions of the First Comptroller and the Judge-Advocate-General.

Whether General Casey is entitled to compensation "for disbursing moneys appropriated for and expended in the construction" of this public building, under the conceded facts, turns entirely upon the construction of the following statutes :

Congress, by an act of July 5, 1838 (5 Stat., 260, sec. 27), entitled "An act to increase the present military establishment of the United States, and for other purposes," provided "that it shall be the duty of the engineer superintending the construction of a fortification, or *engaged about* the execution of *any other* public work, to disburse the moneys applicable to the same; and as a compensation therefor may be allowed by the Secretary of War at the rate of two dollars per diem

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during the continuance of such disbursements: *Provided*, That the whole amount of emolument shall not exceed one per cent. on the sum disbursed."

The same session of Congress, July 7, 1838 (5 Stat., 308), provided, by an "act supplementary" to the above, "that the act to which this is a supplement shall be and the same is hereby explained, *limited*, and *modified* as follows * * * sixth: That *no* compensation shall be allowed to *officers* of the *Engineer Department* for disbursement of public money while *superintending* public works."

These provisions were carried into the revision as section 1153, as follows:

"It shall be the duty of the engineer superintending the construction of a fortification, or *engaged about* the execution of *any other* public work, to disburse the moneys applicable to the same; but *no* compensation shall be allowed *him* for such disbursement."

In 1869, by an act of March 3 (15 Stat., 311, 312), Congress, in a deficiency bill, after appropriating a certain sum for the Treasury Building, attached the following proviso:

"*Provided*, That *no extra* compensation exceeding one-eighth of one per centum in any case shall hereafter be allowed to any officer, person, or corporation for disbursing any moneys appropriated for the construction of any public building."

This proviso was afterwards incorporated in the Revised Statutes as section 3654.

Congress again, in another act to supply deficiencies, on March 3, 1875 (18 Stat., 415), provided:

"That the provisions contained in the act approved March third, eighteen hundred and sixty-nine, entitled 'An act making appropriations to supply deficiencies in the appropriations for the service of the Government for the fiscal year ending June thirtieth, eighteen hundred and sixty-nine, and for other purposes,' limiting the compensation to be allowed for the disbursement of moneys appropriated for the construction of any public building, was intended and shall be deemed and held to *limit* the compensation to be allowed to any disbursing officer who disburses money appropriated

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for and expended in the construction of any public building as aforesaid to three-eighths of one per centum for said service."

This provision was carried into the Supplement to the Revised Statutes, page 166.

These acts of 1869 and 1875, when read together, declare that no *extra* compensation beyond one-eighth of one per cent. should be paid to any one for disbursing, and that the *total* compensation paid to any one for disbursing should not exceed three-eighths of 1 per cent. on any public building. These acts did not assume to fix the compensation to be allowed to disbursing agents, but only to indicate the limits beyond which compensation should not go. Under them no disbursing officer was permitted to receive more than therein specified.

It is of course not claimed that these acts expressly repealed section 1153, Revised Statutes. I think it is also clear that they effect no such repeal by implication. Repeals by implication are not favored by the law. These statutes may all stand without in any way impinging upon each other. They can be read together and full force and effect given to each as follows:

No compensation shall be allowed to any engineer officer for disbursing money applicable to any public work about the execution of which he is engaged (and the reason for this in an engineer's case seems not difficult to find), and no disbursing officer shall receive an *extra* of more than one-eighth, or a *total* of more than three-eighths of 1 per cent. upon his disbursements upon any public building.

It is not at all certain that the limitations as to the one-eighth and the three-eighths of 1 per cent. on disbursements for public buildings—inasmuch as they are coupled with an appropriation in connection with the Treasury Department—were not intended to apply solely to the disbursing agents appointed for public buildings by the Secretary of the Treasury under section 255; but it is not necessary to consider that question.

It is said, however, that this section 1153 is in Title XIV, Revised Statutes, which relates to the "Army," and that,

Compensation for Disbursing Public Money.

therefore, the phrase "any other public work" in section 1153 refers only to work in the line of an engineer's duty as an officer of the Army. But its phraseology came from the acts of July 5 and July 7, 1838, and do not admit of that narrow interpretation. Besides, this suggestion loses sight of section 5600 of the Revised Statutes, which prohibits inferences being drawn from this title.

That General Casey, while superintending the construction of this building, was superintending a "public work," and that he was "engaged about the execution of a public work," seem too clear to admit of argument. If a building which is being erected to furnish three of the most important state departments in the government with headquarters and offices for the transaction of executive business, and rooms and vaults for the preservation of governmental archives, books, records, and property, is not "a public work," it would be difficult to understand what these words mean.

It seems to me that section 1153, Revised Statutes, controls and disposes of this claim. In any event, the right of General Casey to compensation does not seem so clear as to justify me in advising its payment.

It appears to be conceded on all sides that General Casey's services were exceedingly meritorious, and resulted in a large saving to the Government; but this consideration, while addressing itself with full force to any tribunal having discretionary power, can not affect the legal question.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

Fur Seals—Lease of Right to Take.

FUR SEALS—LEASE OF RIGHT TO TAKE.

The Secretary of the Treasury derives no authority, under section 1963, Revised Statutes, to make a new lease of the right to take fur seals on the islands of St. Paul and St. George, in Alaska, until the expiration of the existing lease.

DEPARTMENT OF JUSTICE,
November 11, 1889.

SIR : I have the honor to acknowledge the receipt of your communication of November 7 in which you ask my opinion as to your authority to execute a new lease, or contract, giving the right to take fur seals from the islands of St. Paul and St. George in Alaska before the expiration of the present lease, which occurs on the 30th day of April, 1890. In this connection you call my attention to section 1963 of the Revised Statutes, which provides that—

“ When the lease heretofore made by the Secretary of the Treasury to ‘ The Alaska Commercial Company ’ of the right to engage in taking fur seals on the islands of St. Paul and St. George pursuant to the act of July 1, 1870, chapter 159, or when any future similar lease expires, or is surrendered, forfeited, or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance, and education, as well as to the interests of the parties heretofore engaged in trade, and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seal, for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease, and secured by a deposit of United States bonds to that amount; and every such lease shall be duly executed in duplicate, and shall not be transferable.”

In your communication you further inform me that there is no expectation that the present lease will be surrendered, forfeited, or terminated prior to its expiration by limitation.

You further say: “ If the execution of a lease for a new term of twenty years should be deferred until that date, there

For Seals—Lease of Right to Take.

would not be time for the lessee to prepare for the season's catch of 1890, and serious loss might thereby result to the Government as well as to such lessee."

It seems clear from these statements that the public interest would be subserved had you the power to anticipate the expiration of the present lease by making another to take effect at the date of such expiration. But the question I am called upon to decide is not what the public interest demands, that being a question for Congress, but what is your power in the premises. Congress, by the enactment of this law, has seen fit to invest you with the power to execute this lease or contract, and in connection with that grant of power has prescribed a limitation as to the time when it may be done. That time is when the present lease expires. Suppose that you now execute a new lease or contract, and on or before April 30, 1890, there should be another Secretary of the Treasury who should conclude that a more advantageous contract could be made, would your action conclude him? Or, suppose you should now, or at any time, before the 30th of April, 1890, execute such a contract securing an annual rental of, say, \$75,000 a year, and that on the 30th day of April, 1890, a responsible party should offer to take the lease and pay the Government \$100,000 a year, would you not be bound to accept the latter and better offer? It is well-settled law that the donee of a statutory power can only make a valid execution of such power by a strict compliance with the statutory grant (Endlich on the Interpretation of Statutes, sec. 353; Sedgwick on Construction of the Statutes, second edition, pp. 329, 330) This being so, I do not think that under this statute you can execute the contract in question until the expiration of the present lease.

While it is not a matter called for by your communication, I suggest that probably Congress, if its attention were called to this matter, would promptly grant the necessary power to enter into a lease far enough in advance to save the Government from loss in the premises.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

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Quartermaster's Volunteers.

QUARTERMASTER'S VOLUNTEERS.

Where one served in the war of the rebellion in the military organization known as "Quartermaster's Volunteers," or "Quartermaster's Brigade," and was honorably discharged from the service: *Held*, that he is entitled to the benefit of the proviso in Departmental Rule X of the civil service, as one who "served in the military service of the United States in the late war of the rebellion, and was honorably discharged therefrom," within the meaning of that rule.

DEPARTMENT OF JUSTICE,

November 19, 1889.

SIR: Your favor, with inclosures, under date of November 2, instant, submits the question whether the service of Samuel McPherson in what is known as the "Quartermaster's Brigade" or "Quartermaster's Volunteers" was such as would entitle him to the benefit of the proviso in Departmental Rule X of the civil service.

That rule is as follows: "Upon requisition of the head of a Department the Commission shall certify for reinstatement in said Department, in a grade requiring no higher examination than the one in which he was formerly employed, any person who, within one year next preceding the date of the requisition, has, through no delinquency or misconduct, been separated from the classified service of that Department: *Provided*, That certification may be made, subject to the other conditions of this rule, for the reinstatement of any person who served in the military or naval service of the United States in the late war of the rebellion, and was honorably discharged therefrom, without regard to the length of time he has been separated from the service."

McPherson seeks to be reinstated under the proviso in the above rule. The real question, therefore, to decide is, not necessarily whether McPherson was ever regularly enlisted in the Army, or was a part of the military establishment of the United States, but whether he "served in the military * * * service of the United States in the late war of the rebellion, and was honorably discharged therefrom," *within the meaning of this rule*.

The papers submitted show that he was "captain of Company K, Seventh Regiment of Quartermaster's Volunteers,"

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and that he performed such military services for the United States in the late war as were performed generally by such volunteers.

The organizations known as "Quartermaster's Volunteers" were first ordered into service by President Lincoln, September 2, 1862, by Special Order No. 218, section 3 of which is as follows:

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
September 2, 1862.

"Special Orders, No. 218.
* * * * *

"3. By direction of the President all the clerks and employés on the public buildings in Washington will be immediately organized into companies, under the direction of Brigadier-General Wadsworth, and will be armed and supplied with ammunition for the defense of the capital.

"By command of Major-General Halleck :

"E. B. TOWNSEND,
"Assistant Adjutant-General."

It appears further that subsequently "directions were given by the Secretary of War during the rebellion to enroll the employés of the Quartermaster's Department at various places, and to organize them into companies, troops, and regiments; that these directions were carried out, and such employés were duly enrolled, uniformed, armed, equipped, furnished with horses and accouterments, and were drilled, and frequently employed on scouting and other duty, even fighting; that the officers of these organizations were duly commissioned, and services were rendered under the command of officers of the Army; that they received rations and performed *service of a military character*; * * * that the pay received by these men was not the pay ordinarily given soldiers, but the same received by them when performing clerical work alone, and was paid from the same appropriation; that they were never formally 'mustered in' nor 'mustered out' of the service."

It may be asked, in passing, what difference it makes of the question of their *service* how these men were paid, so long as it appears that they were clothed, armed, equipped, and

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rationed from the army appropriation? What difference does it make on the question of *service* whether they were "mustered in" or "mustered out," so long as they were "ordered in" and "ordered out?" There is nothing in Rule X that (at least in terms) requires an applicant for reinstatement to have been mustered in or out, to have received pay while serving, or to have served a long or a short term. All that is required in that regard is that he shall have *served*.

That these men did serve faithfully and well seems to be conceded. Among the papers submitted is the report of the Quartermaster-General in 1864, from which I take the following extract:

"In the last annual report of this office, I had the honor to report the service rendered in the field as *soldiers*, at Nashville, at Jacksonville, and at Washington City, by the Quartermaster's Volunteers, a *military* organization under your sanction of the clerks, agents, and operatives of the Quartermaster's Department at the principal depots. * * * Two brigades of these *troops*, 4,500 strong, were assigned a position in the operations of the 15th and 16 of December, 1864, the days of the decisive battle of Nashville, and so conducted themselves as to meet and receive the approval of their commanders."

Thus it will be noticed that, *during the war*, Quartermaster-General Meigs, in an *official* report, speaks of them as "*soldiers*," and their organization as a "*military organization*."

Now, taking all the foregoing facts into consideration, were not these men, under these circumstances, "serving in the military service of the United States!"

This inquiry, if answered in the negative, brings up several very embarrassing questions, not simply to the men themselves, but to the President and Secretary of War who ordered them to serve, and to the officers who commanded and led them in such service. If they were not lawfully serving in the military service of the United States, what were they doing? They were enrolled and organized into companies, troops, and regiments; they were uniformed, equipped, rationed, furnished with United States horses and accouterments, and armed with United States guns and ammunition; they were led and drilled by Army officers duly

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commissioned by the United States; they were employed in scouting, in fighting, and in other service of a military character in behalf of the United States. Nor can it be claimed that they were not serving in the military service when they were engaged side by side with other soldiers on the scout, in the trenches, and in the field. Can it be said that when they were fighting and killing the enemy in skirmish or battle they were outside the laws of war? Were these Army officers who led them commanding troops and regiments of guerrillas and marauders? If they were not in such service, then must they not be classed among those described in the celebrated General Order of the War Department No. 100, who, "if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates?"

But it is suggested that they were not honorably discharged. That these men received formal written certificates of discharge, such as regular Army soldiers receive after being mustered out, I do not understand to be claimed; but that they were ordered into the service of the United States—that at the close of war, as their services were not needed, they were released from time to time from further service—honorably released, as appears from these papers, does not seem to be questioned. This was certainly an honorable discharge from further *service*. Whether we say that they were honorably discharged, as the words are used in Army circles, or that they were honorably released, or that their regiments were honorably disbanded, does not seem to be very material, under the wording of this rule, so long as they were honorably dismissed from the service in which they had been compulsorily engaged.

It is of course plainly apparent that if we give to the phrases "military or naval service" and "honorably discharged" the restricted meaning they have in Army circles, the rule will only cover soldiers who have taken all the formal steps of a regular enlistment, service, and discharge. But, if we take the whole clause together, we see an apparent intent to give a broader meaning to these words than is permissible in strict military parlance. If, in place of the words "military service" the word "army" had been used, there

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would be no difficulty in determining the meaning of the rule. But the words "military service" and "discharged *therefrom*" are not as sharp in definition and limitation as the words "army" and "discharged *therefrom*" would have been, and the use of the more general and indefinite phrase is indicative of an intent to broaden the meaning. It is believed that there were many instances of State troops irregularly in the service of the United States in the late war whose rights under this rule would not be questioned. Moreover, what overriding necessity is there for applying here any strict rule of construction? This is not a statute; it is a mere ordinance, which can at any time be modified by the President.

It will also be noticed that the rule only provides as to the *re-instatement* of clerks, and not to original appointments; so that there are very few persons who can be at all interested in this question. My attention has been called to but two existing cases, and in any event the number must be exceedingly small. The rights and privileges of all old soldiers are protected by statute, and are not affected by any conclusion that may be reached here; so that it is not seen how the question is one of any very great practical importance.

There is, therefore, believed to be no necessity either in the wording of the rule, its purpose, surroundings, or practical workings, which calls for a technical interpretation of its phraseology. There is no need for any one-eyed-construction here.

In view of the foregoing, therefore, and especially in view of the consequences of any other reading of the rule, I am inclined to hold that the Quartermaster's Volunteers, while their position was somewhat anomalous, did "serve in the military service of the United States in the late war of the rebellion and were honorably discharged from such service," *within the intent of Rule X.*

The inclosures of your letter are herewith returned as requested.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

W. H. H. MILLER.

Reopening of Settlements.

REOPENING OF SETTLEMENTS.

P. served as a cadet at the Military Academy from July 1, 1865, to June 15, 1869, when he was appointed a second lieutenant, and has ever since served as a commissioned officer in the Army. In February, 1884, he presented a claim for increased longevity pay under any law allowing credit for cadet service, and by settlements made in April, 1885, he was allowed an increase commencing from February 24, 1881, on a construction of law since declared by the Supreme Court, in the case of *United States v. Watson* (130 U. S., 80), to be erroneous. After the decision in that case (March 11, 1889) he filed a claim for longevity pay due under said decision: *Held* that the settlements made in April, 1885, can not be reopened upon the ground that they proceeded on a mistaken view of the legislation governing the subject involved.

DEPARTMENT OF JUSTICE,
November 19, 1889.

SIR: The general question submitted by your communication of August 22, 1889, namely, "whether the Comptrollers of the Treasury should reopen accounts and claims settled by their predecessors on a construction of law since declared by the Supreme Court to have been erroneous," is hardly within my competency under section 356 of the Revised Statutes of the United States, which declares that "the head of any Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department." But there is a question of law presented in your communication which does arise in the administration of your Department, namely:

In February, 1884, John W. Pullman, captain, assistant quartermaster, U. S. Army, filed a claim for service pay "under any and all laws allowing credit for cadet service at the United States Military Academy." By settlements Nos. 6979 and 6980, confirmed April 11, 1885, he was allowed \$583.09 percentage increase upon said claim, the increase commencing February 24, 1881; it being held that prior to the act of that date (21 Stat., 346) no allowance for longevity or percentage increase could be made by computing service as cadet at the United States Military Academy.

Since the decision of the Supreme Court in case of *United States v. Watson* (March 11, 1889) he has filed a claim for all

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longevity rations and increase pay due under said decision. This claim is regarded as an application for a rehearing.

• There was no error in computation in the settlements heretofore made, and no newly discovered material evidence has been filed; hence claimant is not entitled to have his longevity account further considered, unless the decision of the Supreme Court in the Watson case opens all settlements made by the accounting officers upon a different construction of the act of July 5, 1838 (5 Stat., 258).

Captain Pullman served as a cadet from July 1, 1865, to June 15, 1869, when he was appointed a second lieutenant U. S. Army, and he has since been continuously in the service.

The question thus presented I may properly consider.

It is to be observed that my opinion in this matter must be governed by the same general principles that regulate similar transactions on settlements between individuals; for, as the Supreme Court of the United States said in the case of *McKnight v. United States* (98 U. S., 186), "with a few exceptions growing out of considerations of public policy, rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter." There is nothing that I can see in the case before me which withdraws it from the control of this general principle.

If it had happened that Captain Pullman had, through a mere mistake of law of the accounting officers of the United States, been paid too much, instead of too little, it would seem quite clear that the excess could not be recovered back, if the principle applicable to a similar case between individuals should govern; for the Supreme Court of the United States have said that "a voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, can not be revoked, and the money so paid can not be recovered back." (*Lamborn v. County Commissioners*, 97 U. S., 185).

It was held by Attorney-General Brewster in 1882, in General Swayne's case, that this principle was applicable to settlements between the United States and private individuals. General Swayne was entitled to a certain allowance as per-

Reopening of Settlements.

centage increase on his retired pay. But the accounting officers of the Government held that as he had continued to draw pay as a major-general of volunteers after he was appointed colonel in the Regular Army and until he was regularly mustered out of the service as major-general of volunteers, the Government was entitled to set off against his demand the difference between the pay of a colonel and that of a major-general of volunteers. The Attorney-General held that "upon principles of administrative policy, which ought to be considered firmly established, the settlements between Colonel Swayne and the accounting officers in the matter of his pay as a major-general of volunteers are conclusive upon the executive department of the Government, and can not be reopened in the way indicated."

In support of this view the Attorney-General cites *Hedrick's Case* (16 C. Cls. R., 83), where the Court of Claims refused to allow the United States to set off against the claim sued on the amount of moneys that had been, from time to time, paid the claimant under a mistaken interpretation of a statute, the court holding that the question raised by the set-off must be determined by the ordinary principles of law governing individuals. The same doctrine seems to have been approved by Judge Blodgett in the recent case of *Tuthill v. United States* (Chicago Leg. News, June 8, 1887).

The principle, that men must be assumed to know the law, is indispensable to the administration of government and to the finality of settlements made by it and by individuals.

The ease and truthfulness with which such an excuse as ignorance of law could be set up, if permitted, and the difficulty in most cases of disproving it, would introduce instability and uncertainty into the most solemn transactions.

It is no less important to the citizen than to the Government that this principle should be applicable to settlements between him and the Government; for it would be a serious public inconvenience if the government could sue the citizen, at any distance of time, to recover back moneys which its officers had paid to him under some mistake of law, but with a full knowledge of all the facts and circumstances of the case.

If ignorance of the law entering into a settlement is to be

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fatal to such settlement, then almost any settlement made as a compromise might be upset. Nothing is more common than concessions made upon one side and the other resulting in a settlement, for the very reason that each party is in doubt as to what may be his status in the law, and is willing to surrender a part of his claim rather than incur the risks and delay of a test of his rights by a judicial examination.

If, however, a party may thus enter into such a settlement, and when, afterwards, the law shall be ascertained to be more favorable to him than the view upon which he acted, that settlement may be wiped out and the parties required to settle *de novo*, the public policy which favors compromises would be reversed. It is better that no settlement be made than that one be made which is ineffectual.

It is to be observed, furthermore, that if ignorance of law could be urged as a reason for reopening settlements which had been deemed closed, cases would sometimes occur when differences of opinion among courts and lawyers would make it by no means easy to find a satisfactory criterion by which to determine whether what was set up as mistake of law was such or not.

If, then, the principle that every one is assumed to know the law can be relied on by the citizen for his defense when sued by the Government for an overpayment made to him under a mistake of law, it must be conceded that the Government may equally rely on the same principle as a defense when sued by the citizen. For if the principle is to be applicable at all it must be mutual in its operation; and it is more for the benefit of the citizen than the Government that it should be so; for while the Government, if the principle were otherwise, would always be ready, at any distance of time, to refund money paid to it under mistake of law, the same can not, for the most part, be said of individuals.

It follows, therefore, that the settlement in Captain Pullman's case can not be reopened upon the ground that it proceeded on a mistaken view of the legislation governing the subject involved.

I have the honor to be, your obedient servant,
W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

United States Court for Indian Territory.

UNITED STATES COURT FOR INDIAN TERRITORY.

The United States court for the Indian Territory is not invested with authority to appoint commissioners; and hence the accounts of commissioners thereby appointed, for issuing writs for the arrest of persons charged with offenses, are inadmissible.

Such writs are no protection to the marshal for anything he may do under them, nor is he entitled to compensation for serving them.

DEPARTMENT OF JUSTICE,
December 6, 1889.

SIR: I have the honor to acknowledge the receipt of your communication of November 11, signed by the Acting Secretary, informing me that the First Auditor of the Treasury is in receipt of sundry accounts of commissioners, acting as such under appointment by the United States court for the Indian Territory, for issuing process for the arrest and examination of persons charged with offenses falling within the jurisdiction of that court; also, sundry accounts of the marshal of that court for fees and disbursements incident to these proceedings. Upon these facts you ask my opinion upon two questions:

First. Whether said court possesses the power to appoint commissioners; and, in case the answer shall be in the negative, then

Secondly. Whether the marshal is entitled to fees for service of process, etc., emanating from said commissioners as *de facto* officers, or is to be reimbursed for witness fees or other expenses paid by him under their orders.

I. In my judgment United States commissioners are purely statutory officers, and any warrant for their appointment must be found in some United States statute. The act organizing the court for the Indian Territory (25 Stat., 783) does not, in terms, contain any provision authorizing the appointment of commissioners. Is such authority to be found in any other statute?

Commissioners of the circuit courts of the United States are appointed under the provisions of section 627, Revised Statutes, which reads as follows:

"Each circuit court may appoint in different parts of the district for which it is held so many discreet persons as it

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may deem necessary who shall be called ‘commissioners of the circuit courts,’ and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts.

Section 760 of the Revised Statutes relating to the District of Columbia provides that the supreme court shall possess the same power and exercise the same jurisdiction as the circuit courts of the United States. Under this act the supreme court of the District of Columbia has appointed United States commissioners, who exercise all the rights and perform all the duties belonging to commissioners of the circuit courts.

Section 6 of the act of Congress passed June 23, 1874 (18 Stat., 253), gives to the supreme court of Utah the authority to appoint commissioners, who shall have and exercise all the duties of commissioners of the circuit courts of the United States, and also shall have the same powers, as examining and committing magistrates, as justices of the peace.

Section 1910, Revised Statutes, gives district courts of the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Montana, and Wyoming the same jurisdiction as United States circuit and district courts.

The act of January 31, 1877 (19 Stat., 230), confers upon the district court of the western district of Arkansas, in addition to the ordinary power and jurisdiction of district courts, jurisdiction of all causes, except appeals and writs of error, which are cognizable in a circuit court, and provides that it shall proceed there in the same manner as a circuit court.

The last-named act can hardly be considered as giving power to appoint commissioners. It simply adds to the number and kind of cases over which the court has jurisdiction.

There is no statute conferring upon the United States courts generally the power to appoint commissioners; and wherever Congress has granted this authority to other than the circuit courts it has been done in express terms, as in the case of Utah, where the supreme court is authorized to appoint commissioners; or by conferring circuit court powers and jurisdiction upon the supreme or district courts, as in the District of Columbia and the Territories above named.

United States Court for Indian Territory.

It follows that unless the power to appoint commissioners in the Indian Territory is expressly conferred upon the court there established, or language is used from which the power can be reasonably inferred in the statutes establishing the United States court for that Territory, then no such power exists, and the appointment of commissioners was illegal and unauthorized.

An examination of the law creating the court in the Indian Territory shows it to be neither a district nor a circuit court, but, to a certain extent, it partakes of the characteristics of both, and in certain other matters it is unlike either of said courts.

Its authority and jurisdiction are set forth with reasonable clearness and certainty. Its territorial jurisdiction is defined. The attorney and marshal are appointed by the President. The judge is expressly authorized to appoint the clerk and three jury commissioners. His jurisdiction is over all offenses against the laws of the United States committed within the Indian Territory, not punishable by death or imprisonment at hard labor.

The practice, pleadings, and forms of proceeding are to conform as near as may be to the practice existing at the time in the courts of record in the State of Arkansas, in like cases. The plaintiff is entitled to the same remedies as exist under the laws of Arkansas. It also provides that the provisions of chapter 18, title 15, of the Revised Statutes of the United States shall apply to said court, so far as applicable.

By section 16 of the act the judge is granted the same authority to issue writs of habeas corpus, injunctions, mandamus, and other similar process as exists in the circuit courts of the United States.

There is no provision conferring upon the court the general powers or jurisdiction of circuit or district courts.

The power to appoint commissioners is nowhere given in express terms, nor is it included in any of the provisions of chapter 18, title 13, referred to and made part of the statute. It would be a very strained construction to say that it was covered by the sixteenth section, under the head of other remedial process.

My conclusion, therefore, is that the power to appoint com-

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missioners is not found in the act creating the court, nor in any of the acts referred to therein; that such power exists only when it is expressly conferred in terms, or when language is used which necessarily implies the right to exercise such a power; that neither of these conditions exist in the present case, and, as a consequence, the appointment of commissioners was unauthorized and illegal, and they are not entitled to compensation for services rendered.

II. We come, then, to the second question, viz, whether the marshal of the Indian Territory is entitled to compensation for serving writs and process issued to him by the commissioners so appointed.

If the marshal, in good faith, in what he conceives to be the proper discharge of his duty, receives and serves writs issued to him by the commissioners so appointed, and these writs are regular and in due form, it seems inequitable to deprive him of pay for services rendered. The writ assumes to be issued by a commissioner. This "commissioner" so acting has been appointed by the court. Is it for the marshal to question the legality of that appointment?

In the case of *Keely v. Sanders* (9 Otto, 441) the court says: "The law presumes that persons acting in a public office have been duly appointed with authority until the contrary is shown." In 3 Opinions of Attorney-General, 496, it is held that "where a marshal received in due course of law processes of summons and subpœna for the same witnesses, it being the usual mode of procuring the attendance of witnesses in the court from which they issued, and served the same as required, he is entitled to his fees for both services, on their being allowed and certified by the district judge."

Marshals have no control over the practice of the courts, nor over the kind of process which they may issue; they are simply bound as officers of the courts to execute the process issued to them. In the case of the *United States v. Peralta et al.* (19 Howard, 343), the court says, on page 347: "We have frequently decided that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified."

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In the case of *Noble & Eastman v. Holmes* (5 Hill, 194), it is held that: "As a general rule, process regular upon its face is sufficient to protect a ministerial officer acting under it, although it may have been issued without authority."

In the case of *Earl v. Camp*, (16 Wendell 562), Cowen, J., says: "It is insisted that the plaintiff, being a ministerial officer, should be protected by his process, which was fair on its face, though the magistrate wanted jurisdiction; and so, indeed, he should within the case of *Savecool v. Boughton* (5 Wendell, 170), and various cases decided by this court (*McQuinty v. Herrick*, 5 Wendell 242, 243; *Wilcox v. Smith*, *id.*; 231; *Reynolds v. Moore*, 9 *id.*; 35, 37, per Sutherland; *J. Alexander v. Hoyt*, 7 *id.*; 89, *Coon v. Congden*, 12 *id.*; 406, 499; *Rogers v. Mullin* 6 *id.*; 597). These cases go to the utmost length and the true length in the protection of ministerial officers. The law imposes various duties upon them on delivering to them the process of the superior or inferior courts, or the warrant of officers, to the discharge of which they are absolutely bound, provided there is jurisdiction; and though there be a total want of such jurisdiction, if it be not apparent on the face of the process, the law will not put them to inquire and judge of the case. In general they ought not to look beyond the process, and in no case need they do so. * * * "I take it that wherever there is jurisdiction of the process the law means to make the officer safe in yielding implicit obedience."

In the case of *Champaign County Bank v. William Smith* (7 Ohio State Reports, 42), it is held that: "The rule in such cases is, that if a ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter or of the person against whom it is directed, such process will afford him no protection for acts done under it. But if the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process issued in such suit is no trespasser unless the want of jurisdiction appears by such process."

In the case of the *State v. Carroll* (38 Conn., 449), there is a very learned and careful discussion of the subject, and the court holds that: "From a general review of the English and American authorities upon the point, it appears that a definition, in order to be sufficiently comprehensive and ac-

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curate as a general one, must be substantially as follows: An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the officer were exercised: I. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be. II. Under color of a known or valid appointment or election, but where the officer has failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like. III. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. IV. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

The last-named case seems to carry the doctrine to the extreme limit. But all the authorities above referred to, and many others of similar import that might be quoted, are based upon the ground that an office exists to which belong certain powers and duties, and that certain things are done under color of office. But it is another and different question where a person assumes to perform certain duties and exercise certain powers, when as a matter of fact there is no such office in existence.

This matter is considered and the distinction made clear by the Supreme Court of the United States in the case of *Norton v. Shelby County* (118 U. S. R., 426).

By a law passed February, 1867, in the State of Tennessee, the county court of any county was authorized to subscribe to the capital stock of any railroad running through it. In March following a law was passed declaring that the powers vested in the quarterly court should be vested in a board of commissioners created by the act. The board was appointed and performed the functions of a county court, and while so acting it subscribed to the stock of the Memphis River Railroad Company and issued bonds in payment therefor. This

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board of commissioners so created and so subscribing stock and issuing bonds was afterwards declared to be an illegal body, and the law creating it was held unconstitutional. The question arose as to whether they were *de facto* officers, and as such their subscription to the railroad stock valid and binding upon the county.

The court holds that there may be a *de facto* officer, but never a *de facto* office.

Mr. Justice Field, in delivering the opinion of the court, said: "There must be a legal office in existence, which is being improperly held, to give the acts of such incumbent the validity of an officer *de facto*.

"Numerous cases are cited in which expressions are used which, read apart from the facts of the case, seemingly give support to the position of counsel. But when read in connection with the facts, they will be seen to apply only to the invalidity or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a *de facto* officer. * * * None of the cases cited militates against the doctrine that, for the existence of a *de facto* officer, there must be an office *de jure*, although there may be loose expressions in some of the opinions, not called for by the facts, seemingly against this view. Where no office legally exists the pretended officer is merely a usurper, to whose acts no validity can be attached."

Coming back to the matter under consideration, it follows that if there was no such office as that of commissioner in the Indian Territory, there could be no commissioner *de facto*, and all proceedings of the commissioners were void, and all writs issued were the same as if issued by a private citizen. They would neither protect the marshal for anything he might do under them, nor can he claim compensation for serving them.

Both questions asked by you are therefore answered in the negative.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

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Payment of Award in Favor of Samuel Strong.

PAYMENT OF AWARD IN FAVOR OF SAMUEL STRONG.

By a joint resolution passed July 10, 1888, Congress provided that the matters in controversy between S. and the District of Columbia should be submitted to the arbitration of three persons to be appointed by the President, whose award should be final and conclusive as to such matters, and directed the Secretary of the Treasury, in case the award should be in favor of S., "to pay said award," in the same manner that judgments against the District of Columbia are paid when ordered by the Court of Claims. Arbitrators were duly appointed, who awarded S. the sum of \$28,257.38 with interest from November 10, 1874, and the costs of certain suits then pending. Since the award was made suits in equity have been brought against S. in the Supreme Court of the District of Columbia by parties claiming as assignees of his claim against the District, and injunctions have been issued in these suits enjoining him from receiving payment of the award. These suits being consolidated, and the court having appointed receivers with power to receive payment of the award, the latter now formally demand of the Secretary of the Treasury payment of the award to them; S. also demands payment thereof to him; and his assignees demand that their rights as such shall be respected by the Secretary in paying the award: *Advised* that the Secretary can not properly pay the award to the receivers (inasmuch as he is not subject to the jurisdiction of the said court with regard to the fund in question, and it is only when payment is made under the compulsion of an order of a court of competent jurisdiction that the party paying is relieved of liability as to the money paid); *advised* further that it would be improper, under the circumstances of the cases, for the Secretary to pay it to S., but that he should hold on to the fund until the controversy over it between S. and his assignees, pending in said court, shall have been closed by a decree.

The case of George H. Giddings (16 Opin., 367) distinguished from the present case.

DEPARTMENT OF JUSTICE,
December 9, 1889.

SIR: Your communication of October 7, 1889, asking an opinion upon certain questions of law growing out of the claim of Samuel Strong against the District of Columbia, brings to my attention the following facts:

For some years before the passage of the joint resolution, presently to be particularly referred to, Samuel Strong had been engaged in litigation with the District of Columbia, the object of which was to recover what Mr. Strong claimed to be due him by the District for work and labor done and mate-

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rials furnished by him in and about the construction of certain public works.

Congress deeming it advisable to take this litigation out of the supreme court of the District, where it had been and would continue to be a serious obstruction to justice as to the other litigants in that court, owing to the large amount of the time and attention of the court it required, on July 10, 18 8, passed a joint resolution (25 Stat., 1248) entitled "Joint resolution to arbitrate and settle the questions at issue between the District of Columbia and Samuel Strong." After reciting that "for many years there had been vexatious and expensive litigation between the District of Columbia and Samuel Strong that is likely to continue for many years to come, involving each year additional expense to the parties concerned," that "experience shows that matters of account so complicated and extensive consume the whole term of the court trying the same, to the delay of other causes," and that the interests of the Government and the citizens require that such controversies should be ended as speedily and satisfactorily as possible, the resolution goes on to declare (section 1) "that the matters in controversy, as shown by the pleadings between the District of Columbia and Samuel Strong, known in the circuit court of the District of Columbia as causes at law numbered fourteen thousand seven hundred and six and fourteen thousand seven hundred and thirty-six, be submitted to the arbitration of three persons to be appointed by the President of the United States, and the award of said arbitrators, or a majority of them, shall be final and conclusive as to the matters in issue between the parties under the pleadings in said causes, * * * and the Secretary of the Treasury is hereby directed, should the award be in favor of the said Samuel Strong, to pay said award, when duly certified to him by the clerk of said court, in the same manner that judgments against the District of Columbia are paid when ordered by the Court of Claims."

The third section of the resolution provides that before the President shall appoint the arbitrators Mr. Strong shall consent in writing to their appointment, and that any award made by them, or a majority of them, shall be conclusive, and that such consent shall be entered of record in the supreme

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court in which the cases are pending and shall be certified by the clerk of said court to the President of the United States.

This is all of the resolution that seems to have any material bearing on the questions submitted.

The President appointed as arbitrators D. Cady Herrick, S. D. Halliday, and Joseph J. Darlington, who, on January 11, 1889, awarded Mr. Strong the sum of \$28,257.38, with interest from November 10, 1874, and the costs of the suits then pending.

Various assignments of his claim against the District have been made by Mr. Strong from time to time, some before the date of the award and some since. Mr. Strong has also attempted to revoke and annul all of these assignments and the powers coupled with them.

In the view I take of this case it is quite unnecessary for me to make more special reference to these assignments and powers.

Since the date of the award several suits in equity have been brought against Strong and others by Benjamin F. Butler and others, claiming as assignees parts of Strong's claim against the District. Injunctions have been issued in these cases enjoining and restraining Strong from receiving payment of the award. These suits have been consolidated, and on March 2, 1889, the court appointed William F. Mattingly and Andrew B. Duvall receivers with power to receive payment of the said award, and these gentlemen have filed authentic evidence that they have duly qualified by giving the security required by the order appointing them, and they formally demanded payment of the award of the Secretary of the Treasury on March 14, 1889.

Strong has demanded payment of the Secretary of the Treasury, and his various assignees have also demanded that their rights as assignees shall be respected by the Secretary of the Treasury in paying the award.

It is insisted in Mr. Strong's behalf that nothing short of payment into his hands, regardless of the right of all others, whatever those rights may be, will be a valid discharge of the duty imposed on the Secretary of the Treasury by the joint resolution of July 10, 1888 (*supra*).

It would be naturally supposed, from the position taken by

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Mr. Strong, that the language of the law on which it is based was very special and peculiar. But so far from that being so, the law does not even say *expressly* that the amount awarded shall be paid to Strong; it says, "and the Secretary of the Treasury is hereby directed, should the award be in favor of the said Samuel Strong, to *pay said award*, when duly certified," etc., and the question at once suggests itself, whether payment of the *award* to anybody deriving title to it from Strong would not be a good payment under the law. Certainly the words of the law do not seem to me to have the effect of authorizing payment to Strong and of forbidding payment to anybody else claiming as his assignee, under never so clear a title. It would hardly be contended that if Strong were dead his personal representative could not receive payment, or that if he were prevented by some physical cause from going to the Treasury he might not receive payment from the Secretary by the hand of a properly constituted attorney in fact.

It would be a very unusual, if not unprecedented, thing for Congress, in providing a remedy for Mr. Strong against the District, to legislate in such a way as to require the Secretary of the Treasury to ignore the rights of Strong's assignees, who, to the extent of their assignments, have a better right to payment than Strong himself. Congress in this matter was providing for the settlement of a controversy between Mr. Strong and the District of Columbia, not legislating to destroy the assignability or revoke the assignment of a chose in action. The language of a statute must be very clear, indeed, before such an effect can be given to it.

I am satisfied that it would be unreasonable to put any such meaning on the joint resolution of July 10, 1888. It will be observed that this resolution provides for a withdrawal of the litigation between Strong and the District from the supreme court of the District, and establishes a special tribunal of arbitrators to determine the matters in difference between them. It limits the controversy thus referred to the special tribunal to Strong on the one part and the District on the other, and thus makes it impossible for the several parties claiming as assignees of Strong to intervene and become parties to the litigation for the purpose of

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having the judgment of the arbitrators upon their pretensions as assignees of the claim in dispute. Now, I am unable to see that there is any show of reason for saying that Congress intended that the Secretary of the Treasury should be absolutely bound to place the *res* in which these several assignees claim to be part owners with Strong in Strong's hands by a payment to him of the amount of the award, and thus turn their claim as part owners of a fund in the custody of the Government into a mere chose in action against Strong, to be enforced by an action for money had and received against him in any jurisdiction where they might be able to find him. If the claims of these assignees are valid, then Strong has no right whatever to receive so much of the fund as is covered by them, and I can not see how his receipt could be an acquittance to you to the extent of those claims.

To hold, as a ground for executive action, that Congress intended anything so unjust as to put the property rights of these assignees at the mercy of Strong would be to impute a motive which would almost look like a reflection on the legislative department of the Government. And it is especially incumbent on me to refuse to put this unreasonable interpretation on the joint resolution, in view of the fact that the Supreme Court of the United States has repeatedly declined to give full effect to the general language of Congress where it would have been harsh or unreasonable or inconvenient to do so. (*United States v. Jones*, 131 U. S. R.; *Chew Heong v. United States*, 112 U. S. R., 536; *Carlisle v. United States*, 16 Wall., 147, 153; *United States v. Kirby*, 7 Wall., 482.)

Indeed, I am of opinion that not only is it not your duty to pay the award to Strong, but that it would be improper in you to do so under the circumstances of this case. Suits in equity have, as we have seen, been brought against Strong by his several assignees, and Strong has been enjoined in such suits from receiving payment of the claim. There is no question about the jurisdiction of the court as to the various property rights involved in the litigation, however it may be with regard to the fund itself. Indeed, the questions between Strong and his creditors are essentially judicial in their character, and can only be properly determined by a court of equity. It is manifest that the law has not provided

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you with adequate means for dealing with any such complicated state of things, and it would, moreover, be unreasonable, in view of the pending suits, to expect you to turn aside from your usual official duties to act as a chancellor for the settlement of the disputes between Strong and his assignees.

If, therefore, the rights of Strong and his assignees are to be adjusted, it can hardly be through you, but should be through the judicial department of the Government; and, it seems to me, it is your duty to all parties concerned to await the action of that department in the suits now pending. The whole matter is in the possession of the supreme court of the District, and your payment of the fund in dispute to Strong would not only make all the assignments illusory and frustrate the object of the suits, but it would be very much like an interference of the Executive with the powers of the judiciary; for I am unable to see how you could pay this money to Strong, when the court has said he shall not receive payment of it, without at the same time interfering with the undoubted powers of the court—doing what in the case of a private individual would amount to a contempt of court.

Certainly it would seem reasonable that you should treat with as much respect the injunction which binds Strong as a court of law would an injunction of a court of equity restraining a plaintiff from proceeding in an action at law. The court at law is no more subject to be restrained by a court of equity than you are as the head of a Department; but it nevertheless respects the injunction as the act of a court of competent jurisdiction, in order to prevent a failure of justice in consequence of the inadequacy of its own powers; a ground which, as we have seen, may be well taken by you as a reason for not disregarding the injunction against Strong.

The foregoing observations are believed to be in harmony with the long-established usage of the Executive with reference to the payment of awards of commissioners appointed under treaty stipulations to adjudicate international claims, a species of tribunal bearing a close resemblance to that constituted by the joint resolution of July 10, 1888. For the former, like the latter, being without power to hear and determine questions as to ownership of the claims before them, it has always been the custom of the Executive, in cases of

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dispute, to decline to pay sums awarded by these commissions until a court of competent jurisdiction has decided the questions of ownership; such at least appears to have been the practice in cases like the present, where the parties at variance are actively litigating their pretensions; and it is, perhaps a defect in our system that Congress has not provided a way by which the Executive could force conflicting claimants to litigate their claims in a proper court, even though disinclined to do so, and thus avoid dealing with questions which it could hardly have intended that the executive department should determine.

What I have said with regard to your duty to abide the result of the litigation now on foot, seems to be entirely supported by the reasoning of Mr. Justice Story in the leading case of *Comegys v. Vasse* (1 Peters, 212) to show that the fact that the award of the commissioners, under a certain treaty with Spain, directed that the fund in controversy should be paid to Comegys & Pettit, the assignees in bankruptcy of Vasse, was not at all conclusive on Vasse. The learned judge said:

"The object of the treaty was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim can not be brought again under review, in any judicial tribunal; an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow that this authority so delegated includes the authority to adjust all conflicting rights of different citizens to the funds so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it is wholly immaterial for this purpose upon whom it may in the intermediate time have devolved, or who was the original legal, as contradistinguished from the equitable owner, pro-

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vided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives or *bona fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. *Nor could they be presumed to possess the means of exercising such a broader jurisdiction with due justice and effect. They had no authority to compel parties asserting conflicting interests to appear and litigate before them; nor to summon witnesses to establish or repel such interests; and under such circumstances it can not be presumed that it was the intention of either government to clothe them with an authority so summary and conclusive with means so little adapted to the attainment of the ends of a substantial justice.* The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others who asserted a title to the fund, *be left to the ordinary course of judicial proceedings in the established courts where redress could be administered according to the nature and extent of the rights or equities of all the parties.* We are therefore of opinion that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners." (See also *Phelps v. McDonald*, 99 U. S. R., 307.)

Now all that is said here with reference to the want of power of the commissioners to adjust the conflicting claims of parties contending for an amount awarded by them, is directly applicable to the arbitrators appointed to determine the questions at issue between Strong and the District of Columbia. What the learned judge says about the unreasonableness of imputing to the parties to the treaty an intention to give the commissioners the power to adjudicate such conflicting claims, is entirely apposite to the question of the intention of Congress with reference to the arbitrators appointed under the joint resolution of July 10, 1888.

In *Milnor v. Metz* (16 Peters, 221) Congress had passed an act "for the relief of Robert Milnor and John Thompson, ordering the Secretary of the Treasury to pay to them \$2,757.23," being the amount of fees due them as gaugers at the port of Philadelphia. Milnor applied to the Treasury for his half of

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the amount, and Metz claimed the same half as Milnor's assignee under the insolvent law of Pennsylvania; but, as the court states in its opinion, *the department refused to examine the equities of the parties* or look beyond the act of Congress. Metz filed his bill enjoining Milnor from receiving the money, and had a decree for a perpetual injunction, and this decree of the court below (the circuit court of the District of Columbia) was affirmed.

This case is directly in point, because the perpetual injunction granted therein operated upon one of the very parties to whom Congress directed the money appropriated to be paid, after determining for itself what was due them by the United States, and it may be added that in *Phelps v. McDonald* (*supra*) the court, in referring to this case, say, "The Secretary refused to recognize the claim of either party, and left them to adjust the conflict by a judicial determination."

In the fifth volume of Cranch's Circuit Court Reports will be found two cases determined by that court in 1836 and 1837, *Ridgway v. Hays* and *Duluth's administrator v. Coursault*. These cases were bills in equity to restrain certain parties from receiving from the Secretary of the Treasury and the Treasurer of the United States sums of money awarded by the commissioners under the treaty with France of July 4, 1831. Both bills made the Secretary and Treasurer parties and prayed injunctions against them. In both cases these officers pleaded that they were not amenable to the jurisdiction of the court, but, at the same time, stated in their answers that the money in dispute was in the Treasury of the United States and would be paid "to the parties to whom it shall appear that the moneys so awarded are legally and equitably due," thus plainly leaving it to the court to say who was entitled to the fund in dispute.

There have been many other similar cases, some of which are referred to in the case of *Phelps v. McDonald* (*supra*). The last case of this kind is *Porter v. White*, (127 U. S. 235), but perhaps the most important one is the case of *Spain v. Hamilton's Admr.* (1 Wall., 604.)

It may then be very properly said that the practice of the Executive to look to the courts alone to settle disputes al-

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ready in litigation between parties claiming the same fund in the Treasury is too firmly settled to be shaken.

My attention has been called by the counsel of Mr. Strong to the opinion of Mr. Attorney-General Devens of July 11, 1879 (16 Opin., 367), in the case of George H. Giddings, which is claimed to be conclusive on the point that payment should be made to Strong.

In that case Congress made an appropriation of a certain sum for one Giddings. Persons claiming part of this sum filed a bill in the supreme court of this District against Giddings and obtained an injunction and a receiver. The question before the Attorney-General was, whether the warrant for the money should be turned over to the receiver by the Postmaster-General, in whose hands it was. The Attorney-General held that the act of Congress was imperative, and left no alternative to handing over the warrant to Giddings.

There are several answers to the argument based on this opinion, that it has become as much your duty to pay the award to Strong as it was the duty of the Postmaster-General to hand over the warrant to Giddings.

In the first place Congress expressly directed the money to be paid to Giddings, whereas, in the case before me there is no *express* direction to pay the award to Strong, but the direction is to pay the *award* if it should be in favor of Strong; language which, it is more than probable, was suggested by the fact that Strong had made assignments of his claim and might not be entitled to receive the whole or any part of any award that might be made in his favor.

In the second place the Attorney-General seems to have had sufficient before him to satisfy his mind that Congress had canvassed the whole subject involved in the bill in equity; and, by directing the money to be paid Giddings, had practically decided that he alone was entitled to the sum appropriated; for it must have been on that ground that the Attorney-General used the language that "this is already a *res adjudicata* by the body which had the control of granting or withholding the appropriation."

In the third place it is stated in the opinion that "undoubtedly instances can be imagined where it would be convenient to have the aid of the judicial system in order to test

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the various and conflicting rights of parties who may have opposing claims before a Department to the same fund, and cases may be conceived where it would be advisable to delay the decision of the Department until the views of the courts were known as to legal questions; but it can not be admitted as a principle that comity requires that Departmental officers should wait until courts have made adjudications of those questions which are submitted by law to Departmental direction."

Now, it may be reasonably assumed that cases of the complexity and difficulty of the one between Strong and the various persons claiming to be his assignees must have been among the cases the Attorney-General had in view when he used the language just quoted.

I may say, furthermore, that while it does not appear in what way the persons contesting Gidding's right to receive the warrant set up an interest in it, the claim represented by the warrant was in its origin an unliquidated claim against the United States and unassignable, and this fact may have had more or less weight with the Attorney-General, although he says nothing about it. It can not, therefore, it seems to me, be said that this opinion of my predecessor militates at all against the foregoing reasoning to show that the questions between Strong and the other claimants of the fund should be left to the judicial department of the Government, where alone they can be satisfactorily determined and justice can be done to the parties.

There can be no doubt, as I have already said, that the jurisdiction of the supreme court of this District is complete over the questions and the parties involved as matters now stand. The fact that the fund in the Treasury is beyond the control of the court is immaterial. That jurisdiction over the *res* is not necessary to a determination by that court of the questions involved is shown in *Phelps v. McDonald* (*supra*) in which the court says:

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary according to the *lex loci*

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rei sitæ, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*," citing authorities.

And to show that what is thus laid down is in harmony with long-established practice in this District, I may refer to the following remark of Mr. Justice Wylie in *McManus v. Standish* (1 Mackey, 152), which was also a suit to settle disputes as to a fund in the Treasury, namely :

"I think, also, that our own practice—the practice of this court as far back as my memory goes—*has been a uniform course of decision in favor of the jurisdiction of the court*, where it had the parties before it, and beyond that point we need not go, and we do not propose to go, in this case."

This disposes of all the questions submitted, so far as you are concerned, with exception of the one as to whether you can safely pay the award to the receivers, Messrs. Mattingly and Duvall. It is a cogent circumstance against the application of the receivers that in none of the cases above cited was a receiver so much as asked for, and I do not think a case can be found where payment was made by the Treasury to a receiver. Nor is it remarkable that it should be so; for, as payment to a receiver is for the protection of the fund by delivering it from the hazard of the debtor's insolvency, it is not easy to see how any such reason could operate where the United States is the debtor or the holder of the fund in dispute. As a general thing it would be the wish of litigants that the Government should hold the fund while the litigation over it is going on. In no other hands could it be so safe.

I am of opinion that you could not properly pay the award to the receivers. To make payment to a receiver a protection, the debtor or stakeholder paying must be subject to the jurisdiction of the court under whose authority the receiver claims to act; otherwise the payment would be a purely voluntary one, for which the debtor or stakeholders might be held accountable by any person having an interest in the fund and not a party to the order under which the receiver

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accepted payment. It is only when payment is made under the compulsion of a decree or order of a court of competent jurisdiction that the party paying is relieved of further liability as to the money paid.

But as you are not subject to the jurisdiction of the supreme court of this District with regard to the fund in question, as is conceded on all hands, it is clear to my mind that you can not pay this money to the receivers, and thus, by your own voluntary act, devolve on others a trust which the law has committed to your hands alone. When Congress made it the duty of the Secretary of the Treasury to pay the award, it meant that he should pay it to the party or parties to whom it belonged, and not otherwise. It would be to take a great liberty with the language of the joint resolution to hold that it authorized you to pay the award to any one but the party or parties *ascertained to be the owners of it at the time of payment.*

It is impossible for you to know whether the parties to the order under which the receivers make their demand represent *all* the interests that will be claimed in the fund by the time the final decree shall have been entered, or whether, when payment shall be demanded hereafter, on the faith of such decree, the decree will be found to be binding on all the claimants on the fund. Without admitting, therefore, the right of the courts, either as matter of law or comity, to direct or at all interfere with the payments of money or the discharge of other administrative duties imposed on you by law, my advice is that you hold on to the fund until the controversy shall have been closed by a decree.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Customs Service—Suspension from Duty and Pay.

CUSTOMS SERVICE—SUSPENSION FROM DUTY AND PAY.

K., a regularly appointed weigher in the customs service, was, on April 4, 1889, suspended from duty and pay by the collector, under article 1371 of General Regulations of 1884, pending the action of the Secretary of the Treasury upon a recommendation of the collector for the removal of K. On May 23, 1889, the Secretary removed K., who received notice thereof on May 29, 1889. K. claims compensation as weigher for the period from April 4 to May 29. *Advised*, that payment of the claim be declined until it shall have been judicially determined that he is entitled thereto.

DEPARTMENT OF JUSTICE,

December 13, 1889.

SIR: I have the honor to acknowledge the receipt of a letter from the Acting Secretary, under date of November 18, ultimo, inclosing two duplicate vouchers of T. B. Kennett, dated September 20, 1889; also letter from the collector of customs at San Francisco of the same date, to the Secretary of the Treasury; also a letter of the Commissioner of Customs under date of November 9, ultimo, with a request for an opinion upon several questions suggested.

The only question presented by the papers that is not hypothetical arises upon the following statement of facts given by the Commissioner of Customs, to wit:

"Mr. Kennett was on April 4, 1889, a regularly appointed weigher in the customs service at the port of San Francisco, Cal., at an annual salary of \$2,000 per annum. On that day the collector of customs, acting under article 1371 of the regulations of 1884, suspended him from duty and pay, pending his recommendation to the Secretary for Mr. Kennett's removal. On May 23, 1889, the Secretary did remove him, and Mr. Kennett appears to have received notice of such removal on the 29th day of May, 1889. He now claims that there is due him \$297.20 from April 5 to May 29, 1889, both inclusive."

The Treasury regulations specifically applying to the subject "Vacation of office" are given on page 547 of the General Regulations under the customs and navigation laws of 1884, and are as follows:

"Art. 1367. Offices in the customs service are vacated by

Customs Service—Suspension from Duty and Pay.

resignation, removal, death, and expiration of term of service. (R. S., 1767.)

"Art. 1368. Principal officers of customs are removable by the President, with the consent of the Senate of the United States. (R. S., 1767.)

"Art. 1369. Subordinate officers of customs are removable by the Secretary of the Treasury for cause.

"Art. 1370. The names of subordinate officers whose removal is deemed necessary or proper are to be reported to the Secretary of the Treasury with a full statement of the causes determining the removal.

"Art. 1371. In cases of urgency a subordinate may be suspended from duty and pay, pending the action of the Secretary of the Treasury upon the recommendation for his removal."

The above article, No. 1371, was evidently intended to provide a prompt remedy in cases of insubordination or emergency, which could not be acted upon immediately by the Secretary himself, and yet which required immediate action of some kind to be effective. It will readily be seen that in cases like that of the collector at San Francisco, so far away from the seat of Government, the power contemplated is important, and, indeed, at times almost indispensable as a measure of discipline. Even, if rarely exercised, the mere possession of the power to suspend, upon infraction of duty, will exercise a wholesome restraining influence, and will naturally tend to promote obedience, orderly administration, and such loyalty as is essential to an energetic and efficient service. But, on the other hand, if the effect of such suspension is to relieve from service, and still give full pay, then a premium is offered upon disobedience and disloyalty.

Whether this rule is so phrased as to accomplish the desired object may be a matter of some doubt, but I assume that Mr. Kennett accepted his place under this regulation with knowledge of its meaning and object, and there is no sufficient reason shown in the papers submitted why he should not be held to its provisions as having assented to its terms. It is quite possible that, upon any trial involving the right to recover pay during suspension, facts may be shown, independent of the rule, which will materially affect the re-

Timber Cut on Fond du Lac Reservation.

sult; but, in the absence of qualifying facts, the necessity for some such rule, especially if understood and assented to by an appointee, seems to furnish reasonable ground for believing that the courts will uphold it.

My opinion, therefore, is that you should decline to pay Mr. Kennett's claim until the court, after taking cognizance of all the facts, shall have decided that he is entitled to it.

I am induced to advise this course for the further reason that the question is one so important to the proper discipline in and efficient administration of your Department that its final judicial determination is exceedingly desirable.

Your inclosures are herewith returned.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

TIMBER CUT ON FOND DU LAC RESERVATION.

The questions submitted being unaccompanied by a statement of the facts upon which they arise, no opinion is expressed thereon.

DEPARTMENT OF JUSTICE,
December 23, 1889.

SIR: I have the honor to acknowledge the receipt of your communication, with inclosures, under date of December 13, instant, in which you request an opinion upon the question "presented by the Commissioner as to the disposition" by your Department of certain timber referred to by the inclosures. The question is also asked, in case my opinion shall be that the timber can be disposed of by your Department, "whether the Indians can be compensated out of the proceeds thereof for the work of banking said timber."

The question asked by the Commissioner of Indian Affairs is as follows:

"Can the Indian Agent at the La Pointe Agency, Wisconsin, under instructions from the Indian Office or Department

Timber Cut on Fond du Lac Reservation.

of the Interior, dispose of and give a valid title to the pine timber cut on the Fond Du Lac Reservation, Minnesota, by Patrick Hynes and Andrew Gowan, or their agents or employés, during the season of 1888-1889, and now lying in the woods or on skids, on said reservation, and not embraced in any suits now pending in the courts between the United States and said parties, or either of them?"

In reply thereto I would say that there is no statement of facts made, either in your letter or in the inclosures, upon which a legal opinion can be based.

This Department has uniformly declined to find the facts. The facts must be stated by the Department asking for the opinion. This has been the rule, at least, ever since the year 1820. (See 1 Opin., 346; 3 Opin. 309; 5 Opin. 626; 10 Opin. 267; 12 Opin. 206.)

The question of law asked by the Commissioner turns upon the question of fact, whether the United States is the owner and possessed of the timber referred to. The letter of the Indian agent, which you inclose, assumes that the United States is the owner. The letter of the Commissioner asserts that that question is still in suit and undetermined. Your letter gives no statement of facts whatever, so that there is nothing to indicate exactly how the facts are. If the timber belongs to the United States, I see no reason why the officers of the United States have not the right to dispose of it, and to employ any proper agencies in aid of such disposition.

I have, however, inclosed a copy of your papers to the United States attorney for the district of Minnesota, with a request that he furnish me at once a statement as to the condition of affairs in connection with the matter, which, when received, will be sent to you.

Very respectfully,

O. W. CHAPMAN,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

Great Sioux Reservation.

GREAT SIOUX RESERVATION.

The appropriation made by section 25 of the act of March 2, 1889, chapter 405, to be applied and used towards surveying the lands therein described as being opened for settlement, does not become available until acceptance by the different bands of Sioux Indians of the terms of that act as provided in the twenty-eighth section thereof.

That act takes effect when, as matter of fact, the consent of the Indians thereto has been obtained. The proclamation issued under the provisions of section 28 of the act is only designed to be a public evidence of such consent.

DEPARTMENT OF JUSTICE,
January 4, 1890.

SIR: There have been submitted to me through Mr. Assistant Attorney-General Shields for opinion two questions, as stated by you:

First. "Whether the money appropriated by section 25 of the act of March 2, 1889 (25 Stat., 893), can be used before the acceptance of the Indians is made known by proclamation by the President of the United States, as provided in section 28 of said act.

Second. "Whether, if upon the report of the commission it appears that the acceptance and consent have been obtained of the Sioux Nation as provided, the act will take effect thereupon, or only upon proclamation of that fact; that is, whether the proclamation is essential to the act taking effect aside from the fact being mentioned in the report."

The twenty-fifth section of that act reads as follows:

"That there is hereby appropriated the sum of one hundred thousand dollars out of any money in the Treasury not otherwise appropriated, or so much thereof as may be necessary, to be applied and used towards *surveying the lands herein described as being open for settlement*; said sum to be immediately available; which sum shall not be deducted from the proceeds of lands disposed of under this act."

Section 28 reads as follows:

"That this act shall take effect *only* upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and

Great Sioux Reservation.

said Sioux Indians, concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent shall be made known by *proclamation by the President of the United States*, upon satisfactory proof presented to him that the same has been obtained in the manner and form required by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon *failure of such proof and proclamation* this act becomes of no effect and null and void."

Section 29 reads as follows:

"That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of twenty-five thousand dollars, or so much thereof as may be necessary, which sum shall be expended under the direction of the Secretary of the Interior, for procuring the assent of the Sioux Indians to this act provided in section twenty-seven."

It will be observed by the reading of section 28 that the taking effect of the act generally is made to depend upon the assent of the Indians to the terms of the act, and that in the event of the failure of the negotiations to that end the act is to be null and void. This is the plain meaning of the twenty-eighth section, and must be given effect, unless to do so would be to thwart the manifest purpose of the act.

It is too clear for discussion that section 29 was designed to be operative, notwithstanding these provisions of section 28; for it would be absurd to suppose that Congress prepared and passed this long act, and at the very end appropriated a sum of money for defraying the expenses of the negotiations necessary under the act, and yet by reason of earlier provisions in the act made that appropriation invalid. Indeed, upon the well known rule that where there are conflicting provisions in a statute the last shall prevail (Wharton's American Law, sec. 628), this twenty-ninth section would be operative, even were the reasons for supporting such construction less conclusive than they are. But the same considerations do not demand that the appropriation in section 25 shall be held to be available independently of the result of the negotiations. Indeed, from the reading of the act it does not appear to me that it was the purpose of Congress that the survey mentioned in section 25 should

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be made unless the assent of the Indians to the act should be obtained. There are many reasons why, so long as these lands should remain in the occupation and control of the Indians as a part of their reservation, such surveys should not be made. The making of such surveys, and the fixing of the necessary monuments as landmarks, would naturally be regarded by the Indians as an evidence of the purpose on the part of the Government at no remote time to take possession of the lands, and would tend to excite bad feeling, if not actual hostility. Under such circumstances there would be no assurance that landmarks so established might not be changed or obliterated; and it is quite certain that the fact that surveys had been made by the Goverment would be regarded by lawless white men, always to be found in such localities, as an excuse for trespassing upon the Indian lands. Moreover, there was in the nature of the case no necessity for making such surveys before the assent of the Indians to the terms of the act should be obtained.

It is suggested that Congress knew that upon proclamation of the President these lands would be restored to the public domain and be opened for settlement, and that white settlers would rush in and take possession; and unless the lands herein described as being open for settlement were carefully designated by surveys, little heed would be paid to the proper boundaries of the several reservations contained in the act, and the result would be numerous conflicts between the whites and Indians, and complications would arise which would be detrimental to the peace and comfort of both Indians and whites. The answer to this suggestion is plain. It does not at all follow that these lands are to be opened for settlement immediately after the proclamation referred to in section 28 shall be issued.

A settler upon unsurveyed public lands acquires no rights therein (*Buxton v. Traver*, 130 U. S. R., 232). Moreover, it has been repeatedly decided by the Supreme Court that the President has the power to reserve and withhold any part of the public lands, even after survey, from settlement, and that such reservation by the President prevents any settler from obtaining any right in the premises. (*Wolsey v. Chap-*

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man, 101 U. S. R., 759; Williams v. Baker, 17 Wall., 144; Walcott v. Des Moines Co., 5 Wall., 681.)

Such being the law, I am unable to see that the issuing of the proclamation would afford any excuse for settlers entering upon these lands, and, therefore, I see no ground to apprehend the evil consequences above suggested as likely to result from a proclamation before a survey; and I can not believe that it was the purpose of Congress to make this appropriation of \$100,000 available, and to have the same expended in making surveys, before there was any assurance that the rights of the Indians in the land would be extinguished, and the full title acquired by the Government.

I think it plain that it was the purpose of Congress that this act should take effect when the negotiations provided for should result in the consent thereto by the different bands of the Sioux Nation of Indians. When such consent should be obtained the contract would be complete. This act is the proposition tendered to the Sioux Indians by the Government of the United States; their consent is the acceptance of that proposition. When that consent is given the contract is binding upon both parties, and the proclamation is only to be issued as a public evidence of that contract. The proclamation does not consummate the contract; it simply evidences it. The language is: "That said acceptance and consent (of the Indians) shall be made known by proclamation of the President of the United States, upon satisfactory proof presented to him that the same has been obtained in the manner and form required by said twelfth article of said treaty."

My opinion, therefore, is that the act takes effect when, as matter of fact, the consent of the Indians to the act has been obtained, and that while the proclamation should be promptly issued upon the presentation of said proof, the vitality of the act is not suspended awaiting such proclamation.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

Case of Private James Bell.

CASE OF PRIVATE JAMES BELL.

B., while a private soldier, received a certificate of merit from the President for distinguished services, which entitled him, under section 1285, Revised Statutes, to "additional pay at the rate of \$2 per month." He was discharged as such private soldier, and thereupon enlisted as a "general service messenger," agreeably to the provisions of the act of July 29, 1886, chapter 810: *Held*, that he is not entitled, as such general service messenger, in addition to the compensation provided for in that act, to the \$2 per month provided for in said section 1285.

DEPARTMENT OF JUSTICE,

January 8, 1890.

SIR: I have the honor to acknowledge the receipt of your communication of December 24th last, wherein you ask my opinion whether under the act of Congress approved July 29, 1886 (24 Stat., 167), a private soldier, James Bell, who has become a "general service messenger," is entitled to be paid, in addition to the monthly pay of \$60 per month provided for in that act, the further sum of \$2 per month additional pay provided for in section 1285 of the Revised Statutes.

The act of Congress above referred to, authorizing the appointment of "general service messengers," provides that such messengers "shall be paid at the rate of \$60 per month; and all of such men shall be mustered for pay monthly the same as enlisted men, *and shall receive no other compensation, pay, or allowance*, except when on duty, when necessity requires, they shall each be allowed for subsistence one ration in kind to be issued by the Commissary Department."

Section 1285 of the Revised Statutes reads as follows:

"A certificate of merit granted to a private soldier by the President, for distinguished services, shall entitle him to additional pay, at the rate of two dollars per month, while he remains continuously in the service; and such certificate of merit granted to a private soldier who served in the war with Mexico shall entitle him to such additional pay, although he may not have remained continuously in the service."

I understand from your statement of facts that Private James Bell, prior to the time when he was appointed such "general service messenger," had received the certificate of merit granted by the President, entitling him to such addi-

Naval Court-Martial.

tional pay of \$2 per month; and that on the 31st day of July, 1886, he was discharged as such private soldier to enable him to enlist as a "general service messenger."

There is much force in the suggestion that we ought not to suppose that it was the purpose of Congress to take away from a private soldier the reward provided by statute for his distinguished services, and were the statute less clear and specific in its language I should be disposed to adopt this view; but section 1285 characterizes this \$2 per month as *additional pay*, and the act providing for "general service messengers" says that such messengers shall receive no other compensation, pay, or allowance, except in the specific case named. It seems to me there is no room here for construction, whatever may be thought of the wisdom or policy of the enactment depriving this soldier of the reward of his gallantry. It is sufficient for me, my duty being to interpret and not to make laws, that so the statute is written. In my opinion Private James Bell, having become a "general service messenger," is not entitled to the additional pay prescribed by section 1285.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF WAR.

NAVAL COURT-MARTIAL.

Upon consideration of articles 24, 43, and 44 for the government of the Navy (sec. 1624, Rev. Stat.): *Held*, that there may be two arrests, namely, (1) an arrest in an emergency, or upon discovery of the alleged wrongdoing, with a view to a preliminary examination, and, if necessary, the formulation and specification of charges; (2) an arrest for trial: *held*, further, that article 43 in the provision declaring that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest," has reference to the arrest for trial, and not to the arrest in the first instance.

DEPARTMENT OF JUSTICE,

January 18, 1890.

SIR: I have your communication of January 6, wherein you ask my opinion on the following question, namely:

"Whether the provisions of articles 43 and 44 of section

Naval Court-Martial.

1624, Revised Statutes, contemplate that a person accused shall be furnished with a true copy of the charges, with the specifications, at the time of his apprehension or arrest as a preliminary to an investigation of the complaints against him, to determine whether or not there shall be a trial; or at the time when, after such preliminary investigation, the convening authority, having decided to convene a general court-martial for the trial of the case, places the accused under arrest for trial."

Section 1624 of the Revised Statutes provides:

"The Navy of the United States shall be governed by the following articles."

Thereupon follow sixty articles, including numbers 43 and 44 referred to in your question.

The matter under consideration in articles 43 and 44, as well as in the articles preceding and following, is the subject of naval courts-martial.

Article 24 reads as follows:

"No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than private reprimand, suspension from duty, arrest, or confinement, and such suspension, arrest, or confinement shall not continue longer than ten days, unless a further period is necessary to bring the offender to trial by a court-martial; nor shall he inflict, or cause to be inflicted, upon any petty officer or person of inferior rating, or marine, for a single offense, or at any one time, any other than one of the following punishments."

(Here follows a list of the punishments.)

Articles 36, 37, 38, 39, 40, 41, and 42 provide for the convening, organization, and conduct of general courts-martial. Then follows article 43, which reads as follows:

"The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be pro-

Naval Court-Martial.

duced at the trial; in which case reasonable time shall be given to the accused to make his defense against such new charge."

Article 44 reads as follows:

"Every officer who is arrested for trial shall deliver up his sword to his commanding officer and confine himself to the limits assigned him, on pain of dismissal from the service."

Your communication states that your question is asked with reference to the case of an officer who was tried before a naval general court-martial, upon charges of "disobedience to orders, disrespect toward the acting Secretary of the Navy," and "disrespect to the Secretary of the Navy," found guilty, and dismissed from the service. You further state that when arraigned for trial he interposed as a plea to the jurisdiction of the court the fact that he had not been furnished with a copy of the charges and specifications against him at the time of his original arrest; but I infer from your communication that they were furnished him at the time he was formally arrested for trial, though he had been in confinement for some time previous to that time.

In construing statutes, the purpose of their enactment and the evils to be remedied must be considered. The general purpose of section 1624 was, by the enactment of proper regulations or articles of war, to promote the efficiency and discipline of the Navy.

It is a matter of most common information that it is essential to such efficiency and discipline that a commanding officer shall have the right and the power promptly, by arrest and otherwise, to enforce obedience to orders and fidelity to duty. To this end article 24 recognizes the right of such commander to reprimand, suspend from duty, arrest, or confine the delinquent inferior officer, and recognizing such right puts limitations thereon. That such a power in a commanding officer is essential is too plain for argument, and I do not understand that it is denied. It is, however, insisted that consistently with article 43 no person arrested under article 24, even though it should be for disobedience of orders, cowardice, or any other breach of discipline in the face of the enemy, or in the midst of a battle, could afterward be tried for the offense for which such arrest was made, unless

Naval Court-Martial.

"at the time" of such arrest he were furnished with a copy of the charges and specifications upon which it was afterward proposed to try him. To so hold would be to impute to the law-making power a purpose at variance with what we are bound to presume was in view in enacting this statute.

Construing articles 24, 43, and 44 together, it is, in my opinion, clear that there may be two arrests; first, an arrest in an emergency, or upon the discovery of the alleged wrongdoing, with a view to a preliminary examination, and if necessary the formulation and specification of charges; and, second, in the language of article 44, "an arrest for trial." I think it equally clear that article 43, providing that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest," has reference to the second and formal arrest for trial, as referred to in article 44. This, moreover, is fortified by the reason which underlies the requirement that these charges and specifications be furnished. What is that reason? It is the same which requires a defendant on trial, in a civil court, to be furnished with a copy of the indictment against him, namely, that he may know what charges he is required to meet, and may have an opportunity to make preparation. To this end it is in no way essential that he shall have a copy of the charges at the time of his original arrest, but it is essential that he shall have them a reasonable time before he is put upon trial; and this right is secured him by the construction which gives him the charges and specifications when he is arrested for trial. Of course, should he show that the time intervening between the furnishing of such charges and specifications and the time when he is called upon to plead has not been of reasonable length he would be entitled to a postponement; but that would be a question going to the fairness of the trial, and not to the jurisdiction of the court.

The conclusion which has been reached is fortified by the language of article 43. That language is not that the accused shall be furnished with a copy or a statement of the complaint against him, at the time of his arrest, but with a "true copy of the charges *with the specifications*"; using language which implies that the charges have been prepared with all

Pardon.

the care and formality of an indictment; language utterly inconsistent with the idea that the accused is entitled to them at the time of his original arrest.

There is no more urgent reason why a naval officer put in arrest should, at the time, be given a copy of the charges and specifications against him than in the case of an army officer; yet article 71 of section 1242, Revised Statutes, provides that in case of an arrest of an army officer a copy of the charges shall be served upon him within eight days after his arrest. I have no doubt that both the spirit and the letter of the articles for the government of the Navy require that a copy of such charges and specifications be furnished within a reasonable time after the first arrest; and what would be such reasonable time would depend on the circumstances of each case. Whether they were so furnished in this particular case, or whether the convening of the court-martial was too long delayed, are questions with which I have nothing to do. It would seem, however, that, in any event, those objections would go only to the regularity of the proceedings—not to the jurisdiction of the court. But, waiving that point, all I am called upon to decide is whether article 43 of section 1624 is imperative in the requirement that the person accused shall be furnished with "a true copy of the charges, with the specifications, at the time he is put under arrest" in the first instance, and that question, in my opinion, should be answered in the negative.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

PARDON.

The President has power to grant a pardon to a prisoner undergoing punishment for a contempt of court.

DEPARTMENT OF JUSTICE,

January 30, 1890.

SIR: I have examined the question made by you as to your power to grant a pardon to a prisoner undergoing a sentence for contempt of court. I find that the existence of such a

No Man's Land.

power has been affirmed in opinions by several of my predecessors, as follows: First, by Mr. Gilpin (3 Opin., 622); second, by Mr. Mason (4 Opin., 458); third, by Mr. Crittenden (5 Opin., 579).

I also find that the same thing has been adjudged by the United States circuit court (17 Blatchford, 230); also, by the supreme court of Mississippi in *ex parte Hickey* (12 Miss., 75). It has been decided over and over again that contempt of court is an offense against the United States.

I think, therefore, so far as the existence of your power is concerned, there need be no hesitation to act in the premises; indeed, I know beyond question that the power exists.

I return you herewith the papers in the case.

Respectfully yours,

W. H. H. MILLER.

The PRESIDENT.

NO MAN'S LAND.

Upon re-examination of the question whether the territory called "No Man's Land" lies within the boundaries of any judicial district of the United States: *Advised* (1) that from January 6, 1883, to March 1, 1889, said territory was included within the boundaries of the judicial district for the northern district of Texas; (2) that since March 1, 1889, it has been and is included in the judicial district for the eastern district of Texas; thus dissenting from the opinion of Attorney-General Garland of November 15, 1887 (*ante*, p. 66).

Violations of laws of the United States committed within that territory are properly cognizable in the circuit and district courts of the United States for the eastern district of Texas.

DEPARTMENT OF JUSTICE,
January 31, 1890.

SIR: I have the honor to acknowledge the receipt of your letter of January 7, 1890, inclosing a copy of a letter from the Commissioner of Internal Revenue, a copy of a letter of December 30, 1889, from N. F. Acers, collector of internal revenue for the district of Kansas, all relating to affairs in "No Man's Land." I am requested to inform you whether it is now held that the United States courts have jurisdiction over "internal revenue" offenses committed in that land; also respecting a

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decision by Judge Foster, affirmed by Judge Brewer, and referred to in Acer's letter.

On the 15th day of November, 1887, my predecessor, in an opinion to the Secretary of the Treasury, advised that acts, elsewhere punishable as criminal by the laws of the United States, if perpetrated in "No Man's Land" could not be punished, because this land was not then included in a judicial district, the boundaries of which "were previously ascertained by law." (Article VII, Amendments to the Constitution of the United States.) A recent decision of the Federal court, *in re Jackson*, circuit court, district of Kansas (40 Federal Reporter, 372), having expressed a contrary opinion, I deem it proper to review the facts.

The territory commonly known as "No Man's Land" is a strip about 175 miles in length and 35 miles in width; it is bounded northerly by the States of Colorado and Kansas, easterly by the one hundredth meridian west of Greenwich, southerly by the State of Texas, and westerly by New Mexico. Originally this territory formed a part of Texas, whose boundary on the north, at the date of its admission to the Union in 1845, was what is now known as the southern line of Kansas and Colorado, and on the west by New Mexico, then Mexico.

In 1850 the boundaries of Texas were established (9 Stat., 446), by which act all its territory exterior to these boundaries was ceded to the United States; this included "No Man's Land." From that time this strip became part of the public domain of the United States.

Is this territory included in a judicial district the boundaries of which are "ascertained by law?" December 29, 1845, while this strip belonged to Texas, that State was organized into a United States judicial district called the district of Texas, with courts having the same jurisdiction as the United States circuit and district courts. On the establishment of the boundaries of Texas in 1850, as above, there was no provision in terms modifying the previous jurisdiction of the United States courts of this Territory. The same is true when, February 21, 1857 (11 Stats., 164), the State of Texas was divided into judicial districts.

The effect of these acts was probably to place this land out-

No Man's Land.

side of any judicial district whose boundaries were established by law. It still formed a part of the public domain of the United States, and what was then its exact legal status is the question upon which the difference of opinion has arisen. If it was thereafter legally known as "Indian country," so that subsequent acts of Congress designating "Indian country" applied to it, then it will be found to be included in a judicial district of the United States, the boundaries of which "are ascertained by law;" if the contrary, then it is not so included. Upon the assumption that it was not legally designated as "Indian country" or "Indian territory" is based the opinion of my learned predecessor above referred to. While not free from doubt, I am inclined to the view that this strip is legally designated as "Indian country" or "Indian territory," using the word "territory" not in the sense of a political organization, but synonymously with "country" or "land."

In an opinion given to the Secretary of War on August 12, 1879 (14 Opin., 290), Attorney-General Williams said:

"The question what is Indian country within the meaning of the Indian intercourse laws, is one of less easy solution. By the act of March 30, 1802 (2 Stat., 139), a boundary line between the territory then allotted or secured by treaty to the Indians (which is therein designated as 'Indian country') and the other territory of the United States was definitely established by metes and bounds, with a proviso, however, that the same might thereafter be varied by treaties with the Indians. From the multiplicity of these treaties, it in the course of time became too difficult to ascertain precisely what were the limits of the Indian country. To remedy this inconvenience and render those limits more obvious and certain, the act of June 30, 1834 (4 Stat., 729), in its first section provided 'that all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State, to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.'

"The understanding of the framers of the law of 1834

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was, that the Indian country, as thereby defined, would embrace, first, the whole of the territory of the United States west of the Mississippi, not within the States of Missouri and Louisiana or the Territory of Arkansas; second, that part of the territory of the United States east of the Mississippi not within any State, to which the Indian title remains unextinguished (see report of the committee, House of Representatives, No. 474, first session Twenty-third Congress, pp. 1, 10). In the report just cited it is remarked with reference to the Indian country, as defined in the first section of that act: 'On the west side of the Mississippi its limits can only be changed by legislative act. On the east side of that river it will continue to embrace only those sections of country not within any State to which the Indian title shall not be extinguished. The effect of the extinguishment of the Indian title to any portion of it (*i. e.*, of the country east of the Mississippi) will be the exclusion of such portion from the Indian country.' * * *

"From this legislation it would seem that in the view of Congress, the Indian country west of the Mississippi, as defined in the act of 1834, was *originally* limited to the territory then belonging to the United States situated between that river and the Rocky Mountains, and not within the States of Missouri and Louisiana or the Territory of Arkansas. Respecting that part of the Indian country, it was the understanding of the framers of the act of 1834 that the limits thereof could only be changed by legislative enactment. I am not aware of the existence of any statute that, in direct terms, changes those limits. But the course of legislation since the date of that act in opening up a great portion of that region to settlement, in establishing Territorial governments there, and in the admission of new States formed therein, has doubtless the effect to alter the limits referred to, or at least to very much restrict the applicability of the Indian intercourse laws within the district of country thereby described."

If the assumption that the limits of "Indian territory" might be reduced, but not *enlarged*, without Congressional action, is correct, then this opinion corroborates that of November 17, 1887, *supra*, for in 1834, when this act was passed, this strip was not a part of the public domain of the United

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States. I am constrained, however, to adopt the reasoning of Brewer, J., now a justice of the Supreme Court of the United States, on this subject, as found in *re Jackson, supra*, that while the definition of "Indian country" given in the act of June 30, 1834, was made "for the purposes of that act," yet "this original territorial boundary may, without any undue stretch of language, be regarded as a shifting boundary" as the territorial extension of the United States *increases*, or as a Territory was carved out of it for political organization."

The Supreme Court of the United States, in *Ex parte Crow Dog* (109 U. S. R., 556), held that the definition of the term 'Indian country,' contained in chapter 61, section 1, of the act of 1834 (4 Stat., 729), though not incorporated in the Revised Statutes, and though repealed simultaneously with their enactment, may be referred to in order to determine what is meant by the term when used in statutes, and that it applies to all the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not, and whether acquired before or since the passage of that act.

The United States, in 1865 (14 Stat., 717), entered into a treaty with the Comanche and Kiowa tribes of Indians. The treaty describes a tract embracing the land in question, and set apart the same "for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty, and of such other friendly tribes as have heretofore resided within the limits, or as they may from time to time agree to admit among them." Thus this strip, to all intents and purposes, by *Congressional action* became "Indian country." The act establishing the district court of the United States at Wichita, Kans., and for other purposes (22 Stat., 400, sec. 2) provided, "That all that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, shall from and after the passage of this act be annexed to and constitute a part of the United States judicial district of Kansas; and the United States district courts at Wichita and Fort Scott, in the district of Kansas, shall have exclusive original jurisdiction of all offenses committed within the limits of the

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territory hereby annexed to said district of Kansas against any of the laws of the United States now or that may hereafter be operative therein." Section 3 provided, "That all that portion of Indian Territory not annexed to the district of Kansas by this act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the United States judicial district known as the northern district of Texas; and the United States district court at Graham, in said northern district of Texas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said northern district of Texas against any of the laws of the United States now or that may hereafter be operative therein."

The whole "Indian country" is thus embraced, and the land in question was within the limits of the judicial district of Texas. This act was passed January 6, 1883. Further legislation was had in the act of March 1, 1889 (25 Stat., 783), entitled "An act to establish a United States court in the Indian Territory, and for other purposes." Section 1 describes the boundaries as follows: North, by the State of Kansas; east, by the States of Missouri and Arkansas; south, by the State of Texas; west, by the State of Texas and the Territory of New Mexico. "No Man's Land" is thus included in the boundaries. Section 17 declares the Indian Territory under the jurisdiction of the United States circuit and district courts. It is divided into two parts, one particularly described and assigned to the district of Kansas, while the whole remaining portion is made subject to the jurisdiction of the eastern district of Texas. Were the matter merely in doubt I should be unwilling to conclude that Congress had neglected to provide for the due execution of the laws of the United States in any public domain.

My conclusions are:

First. That from January 6, 1883, to March 1, 1889, this strip of land was included within the boundaries of a judicial district "ascertained by law," viz, the judicial district for the northern district of Texas.

Second. That since March 1, 1889, this Territory has been

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and is included in the judicial district for the eastern district of Texas.

Third. That violations of all laws of the United States committed within that boundary, whether criminal or relating to "internal revenue," are properly cognizable in the circuit and district courts of the the United States for the eastern district of Texas established as above.

The case referred to in Collector Acer's letter is that of the *United States v. Soule et al.* (30 Federal Reporter, 918).

I am, sir, very respectfully, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

POWER OF ATTORNEY—REVOCATION.

A power of attorney given to collect a claim against the Government, with an agreement that the donee of the power shall receive "a sum equal to 50 per cent. of the amount allowed" on the claim, is not a power coupled with an interest, and is revocable.

The power having been given to a firm, one of the members of which has since died, whereby the firm became dissolved, such power can not be executed by the surviving members.

Under the circumstances stated, the power should not be recognized.

DEPARTMENT OF JUSTICE,
January 31, 1890.

SIR: I have the honor to acknowledge the receipt of your letter of June 27, 1889. In it you ask—

"Whether powers of attorney, coupled with an interest, and irrevocable in terms, given to a firm prior to the death of one of the parties, and since revoked by the principals, are null and void, or whether such powers still remain valid notwithstanding the revocation by the principals?"

This question is materially modified by the facts set forth in the "detailed statement" of the Solicitor of the Treasury, to which you call my attention, and still more by the blank forms of contract and power of attorney inclosed in your letter of July 6, 1889, which you give "*as representing the exact nature of the powers and agreement in question.*"

In the question you assume that the papers show a power coupled with an interest; but I do not think there is con-

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tained in this contract what *the law recognizes* as a "power coupled with an interest," such as would prevent a principal from revoking his authority. By the contract, Riggs, Whitely & Co. agree to take charge and control of the second party's claim against the United States, and to prosecute the same, for which the second party agrees that the first party shall have "a sum equal to 50 per cent" of the amount allowed on such claim. The power of attorney provides that the above second party appoints said Riggs, Whitely & Co. its attorney irrevocable to collect such claim, in the name of said second party, that is, in the name of the principals, and gives the usual power to sue for, or settle and compromise, the same, give receipts, etc.

I do not find in the contract or power of attorney, either or both, that any *interest in such claim* is given to Riggs, Whitely & Co. before or even after it shall be allowed. The agreement is that they shall receive "a sum equal to 50 per cent. of the amount allowed." This is not sufficient to create a power coupled with an interest, under the authorities.

"By the phrase 'coupled with an interest' is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate." (*Hunt v. Rousmanier's Administrator*, 8 Wheat, 174.)

"A mere interest in the results or proceeds of the execution of the authority, as by way of compensation, is not enough." (Mechem on Agency sections 207 and 244, and cases cited.)

Nor is the word "irrevocable" in the power of attorney conclusive. It is the general rule that a principal can revoke the power, except in cases where the power is coupled with a sufficient interest, although the power be in express terms declared to be "exclusive" or "irrevocable." (Mechem on Agency, sections 204, 207, and cases cited.) See also *id.*, section 209, as giving reasons for the rule.

A power coupled with an interest may be executed in the name of the donee of the power, and hence may survive the death of the principal. (*Hunt v. Rousmanier's Administrator, supra.*)

If the above views are correct, there is nothing to prevent the principals from revoking their power of attorney.

Power of Attorney—Revocation.

But it further appears from the statement of the Solicitor of the Treasury, to which you refer, that one of the members of the firm of Riggs, Whitely & Co. has died. This materially affects the question. The death of one member of a firm operates immediately and inevitably as a dissolution. It is a general rule of the common law that an authority by a principal to two persons to do an act is joint and (except in certain cases) the act must be concurred in by both. The principal would not be bound by the act of a surviving member of the firm, because he had never appointed him to act nor agreed to be represented by his acts. This law of agency was laid down in *Marine v. International Life Insurance Company* (53 N. Y., 339, 432, 344), and has application here in the absence, as before noted, of a power coupled with an interest. (See also Mecham on Agency, sections 221, 251, and 247.)

But if this be true as to the survivors of the old firm, what can be claimed by a new firm, composed of such survivors and a new member with whom the principal has had no dealings whatever?

What precedes has been upon the theory that Riggs, Whitely & Co. did not have an interest in the claims referred to. But if they did get an interest in them, under and by virtue of their contract and power of attorney, then I am at a loss to see why section 3477 of the Revised Statutes is not fatal to their position.

It provides that: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, or ascertainment of the amount due, and the issuing of a warrant for the payment thereof." * * * (See 5 Opin., 85).

It may be that Riggs, Whitely & Co., or their successors, may have a right of action against their principals for the amount agreed upon in one or many cases; but the Government has nothing to do with this, and can not be called

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upon to decide as to the relative rights of these parties under their contract.

My opinion is, therefore, that the Government officers are not compelled to recognize the power of attorney exhibited, under the circumstances detailed.

I return the letter of the Solicitor of the Treasury, as requested.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

IMMIGRATION ACT.

In carrying out the provisions of the act of August 3, 1882, chapter 376, the Secretary of the Treasury is not restricted to the employment of the means and agencies mentioned in the second and fourth sections of that act, but may, in his discretion, have recourse to other appropriate means and agencies.

DEPARTMENT OF JUSTICE,
February 8, 1890.

SIR: I have the honor to acknowledge receipt of your communication of January 27, 1890, calling my attention to section 2 of an act entitled "An act to regulate immigration," and requesting my opinion "as to the power of the Secretary of the Treasury to execute the provisions of the act *without* entering 'into contracts with such State commission, board, or officers as may be designated for that purpose by the governor of any State to take charge of the local affairs of immigration in the ports within such State.'" I have given the matter such attention as I was able and submit the following:

Section 1 of the act provides for a duty of 50 cents to be levied on every passenger, etc., from a foreign port, not a citizen of the United States; the money being collected at the port of landing, and to be paid into the Treasury, and to be known as the "immigrant fund," and to be "used under the direction of the Secretary of the Treasury to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the re-

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lief of such as are in distress, and for the general purposes and expenses of carrying this act into effect."

Section 2 provides "That the Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act and with supervision over the business of immigration to the United States, and for *that purpose* he shall have power to enter into contracts with such State commission, board, or officers as may be designated for that purpose by the governor of any State to take charge of the local affairs of immigration in the ports within said State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid, under the rules and regulations to be prescribed by said Secretary."

Section 3 provides "That the Secretary of the Treasury shall establish such regulations and rules, and issue from time to time such instructions not inconsistent with law as he shall deem best calculated to protect the United States and immigrants into the United States from fraud and loss, and for carrying out the provisions of this act and the immigration laws of the United States."

By section 4, "The Secretary of the Treasury may designate the State board of charities of any State in which such board shall exist by law, or any commission in any State whose duty it shall be to execute the provisions of this section without compensation."

The question presented is, whether the Secretary of the Treasury is *confined to the agencies* mentioned in sections 2 and 4, or may adopt any other appropriate means for the carrying out the objects of the statute.

Questions relating to the regulation of commerce have formed the subject of much discussion, especially as to the relative authority of the United States and the State governments.

In the Passenger Cases (7 How., 283), a law of the State of New York, authorizing the collection "from the master of every vessel arriving in the port of New York from a foreign port \$1.50 for each cabin passenger, etc.", was held by the Supreme Court "repugnant to the Constitution and laws of the United States, and therefore void." The same determination

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was reached by a unanimous court in *Henderson et al. v. The Mayor of New York et al.*, in 92 U. S. R., 259. In the latter case the conclusion reached was that "such a statute of a State is a regulation of commerce, and when applied to passengers from foreign countries is a regulation of commerce with foreign nations." The statutes in question were held void "because legislation on the subjects which they cover is confined exclusively to Congress by the clause of the Constitution which gives to that body the right to regulate commerce with foreign nations."

Whatever divergencies of opinion had previously existed among the judges of the Supreme Court, there can be no doubt that this decision authoritatively settled that question.

The law under discussion was passed a few years subsequent to this last decision and is to be construed in harmony with the views therein expressed.

As an officer of the United States and representing its sovereignty in this regard, this act places upon the Secretary of the Treasury the *primary* responsibility for the execution of its provisions. In the light of the historical evidence, it can not be supposed that it was the intention of Congress to restrict the Secretary of the Treasury to agencies over which he has not original control, and which are held by the Supreme Court constitutionally incapable of acting in the premises.

The Secretary of the Treasury by this act "shall have power to enter into contracts with such State commission, board, or officers as may be designated for that purpose by the governor of any State."

I know of no authority by which the United States can compel the States to provide a commission, board, or other officers such as is intended. Neither do I know of any power in the United States to compel the governors to designate such body, if it already exists.

The creation and designation are matters of State concern alone. In any case the use of these agencies must be subject to an agreement.

Should such commission, board, or other officer exist by State law, it might happen that in the judgment of the Secretary of the Treasury it would be unfit for the purposes mentioned either in its construction, its past action, or the known personal views of its members.

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Many contingencies might arise whereby the harmony of views and action required in the execution of the law might not exist, and could work practically a discontinuance of the law. For in the event of such disagreement occasioning a breach of the contract, the Secretary of the Treasury would be obliged to discontinue the enforcement of the law; or, referring the matter to the political authority of the State, endeavor to reconstruct such commission or board—a process too uncertain and dilatory to be of practical use.

I am unwilling to conclude that it was the intention of Congress to make the execution of this act rest upon such precarious means. The subject is one of national concern. It can not be assumed that all the States having ports subject to this act have such commissions or boards; while at least one State (Texas) has, by its constitution, prohibited such creation. Nor can it be assumed that if all such States now possess such commissions or boards, they will be continued. There can be no legal certainty that the States are or will continue in harmony with the National Government on these matters. The history of the constitutional enactment on which this power of Congress rests shows conclusively that it was designed to prevent diversity of action, to prevent one State making laws which would work hardships to other States. If such diverse legislation by the State were permitted, commerce with foreign countries would be hindered, not promoted. If the Secretary of the Treasury be confined to these State agencies, it is clearly within the power of one State to prevent the operation of the immigration laws, either by the legislature refusing to provide such commission or board or the Governor refusing to designate, or by the commission or board refusing to make reasonable terms of contract or to act in harmony with the policy of the Secretary. To all intents and purposes the General Government would be at the mercy of the State; a condition of things never contemplated in relation to any right or duty constitutionally imposed on the United States.

Whenever such commission or board exists there may be a propriety in its employment by the Secretary of the Treasury. In my opinion such propriety of use is to be determined by the Secretary as a matter of discretion only.

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The act itself, section 1, in providing that the duty levied shall constitute a fund, etc., "for the general purposes and expenses of carrying this act into effect," furnishes the Secretary of the Treasury with the necessary pecuniary means of enforcing it. The construction of this act is clearly distinguishable from that of acts where a duty is placed upon a public officer towards some individual or class. In such case whatever may be the language it will generally be construed as mandatory. Here no duty rests upon the Secretary of the Treasury towards such commissions or boards. They have no rights guaranteed by the statute which it is his duty to protect. Whatever connection they can have with the enforcement of the law, is one resting on mutual agreement. This view is thus stated by a recent work on statutory construction :

"On the other hand the prescriptions of a statute often relate to the performance of a public duty. In such case they are said not to be of the essence or substance of the thing required, compliance being rather a matter of convenience, and the direction being given with a view simply to proper, orderly, and prompt conduct of business; they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or in other words, as directory only." (Endlich on the Interpretation of Statutes, sec. 436.)

Again the same author says:

"In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves unless a contrary intention can be clearly gathered from the statute construed in the light of other rules of interpretation." (Ib., sec. 437.)

This view is strengthened by the language of the Hon. E. R. Hoar, Attorney-General (13, Opin., 247,) which is as follows :

"In many ports of the United States there are no portwardens, and a construction that would require certain things to be done by officers of a State, in administering the revenue laws of the United States, when the provision so construed is not made to take effect on the condition that there

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shall be such officers, and when in fact in most of the ports there are no such officers and there is no such provision in the Statutes of the United States looking to the appointment of any such officers, must be avoided, if it can be done consistently with the established rules for the construction of statutes."

I am therefore of opinion that the Secretary is not restricted in the carrying out of the provisions of this act to the agencies mentioned in the second and fourth sections; that it is within his discretion whether he will use them or not.

I am, sir, very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

SINKING FUND OF UNION AND CENTRAL PACIFIC.

The power conferred on the Secretary of the Treasury by section 5 of the act of March 3, 1887, chapter 345, to re-invest the "sinking funds" mentioned in that section, extends as much to the United States bonds then held by him as part of the sinking fund under the "Thurman Act," as to any money paid in from time to time for the purposes of that sinking fund.

The United States bonds now in such sinking fund may be sold and the proceeds thereof re-invested in the first-mortgage bonds of any of the railroad companies referred to in the said act of March 3, 1887, as having received aid from the Government in bonds. Opinion of Attorney-General Garland, of March 31, 1887 (18 Opin., 595), dissented from.

DEPARTMENT OF JUSTICE,

February 13, 1890.

SIR: Your communication of October 14, 1889, submits for opinion certain questions growing out of an application by the Union Pacific Railroad Company to you as the officer designated by law to make and take charge of the investments required to be made from time to time by the act of May 7, 1878 (20 Stat., 56), commonly called the "Thurman Act," as a sinking fund, which the said act declares "shall be established in the Treasury of the United States" to secure the debts of the Union Pacific and Central Pacific Railroad Companies which are a lien on the property of said companies

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prior to the lien thereon for the benefit of the United States, and also to secure the United States to the extent that it may have a right to look to the said sinking fund for protection.

The application of the Union Pacific Company is that you will exercise the authority supposed to be conferred on the Secretary of the Treasury by section 5 of the act of March 3, 1887, amendatory of the "Thurman Act," and proceed to sell the Government 5 per cent. bonds composing so much of the sinking fund under the "Thurman Act" as appertained to the Union Pacific Company when the act of 1887 was passed, and to re-invest the proceeds in the first-mortgage bonds of any or all of the railroads mentioned in the act of March 3, 1887 (*supra*), the same being the railroads that have received aid from the Government in bonds.

Section 5 of the act of March 3, 1887 (*supra*), on which the application of the Union Pacific Company is based, is in the following words:

"That the sinking funds which are or may be held in the Treasury for the security of the indebtedness of either or all of said railroad companies may, in addition to the investments now authorized by law, be invested in any bonds of the United States heretofore issued for the benefit of either or all of said companies, or in any of the first-mortgage bonds of either of said companies which have been issued under the authority of any law of the United States and secured by mortgages of their roads and franchises, which by any law of the United States have been made prior and paramount to the mortgage, lien, or other security of the United States in respect of its advances to either of said companies as provided by law."

The questions submitted for opinion are as follows:

1. Whether the act of March 3, 1887, authorizes the sale of United States bonds now in the sinking fund and the re-investment of the proceeds as authorized by that act.
2. Whether the sinking funds can be invested in the first-mortgage bonds of "any of the roads" that have received aid from the Government in bonds.

Addressing myself to the first question, I am entirely clear that the power conferred on the Secretary of the Treasury by

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section 5 to invest the "sinking funds" which are held by him in the bonds mentioned in that section extends as much to the 5 per cent. bonds then held by him as part of the sinking fund under the "Thurman Act," of which section 5 is an amendment, as to any money now paid in or to be paid in from time to time for the purpose of that sinking fund; and, therefore, that the Secretary is empowered to sell the 5 per cent. bonds then constituting the sinking fund, if deemed advisable, and invest the proceeds in the way authorized by section 5.

There does not seem to be any question that the term "sinking funds" as used in section 5 includes money in hand for investment of the sinking fund established by the "Thurman Act," it appearing both from the context of the law and the circumstances under which it was enacted, which circumstances will be particularly referred to hereafter, that Congress could not have intended in section 5 to restrict "sinking funds" to the usual sense of the term, that is, to designate only investments for accumulation to be eventually sunk in the payment of some debt, and which is the sense in which the term seems to be employed in the "Thurman Act." But I can not see any reason for holding that because Congress has used the term "sinking funds" in this liberal and unusual sense it intended to deny to the term the usual and proper sense of designating investments for accumulation, especially when it is perfectly clear that the law can have a beneficial operation in both senses of the term, and that by refusing to give the term its usual and proper sense, the sinking fund, for reasons presently to be stated, will be seriously crippled. I say "*usual and proper sense*" not to criticise the language of Congress, but because in the absence of intention to use the term in the larger sense, which is apparent in the act, I should find it difficult to hold that money uninvested and unproductive could be a sinking fund at all.

Indeed, I think there is great reason for saying that Congress intended, by the use of the plural "sinking funds" in section 5, to make more clear its purpose to employ the term in both of these senses; and it adds no little force to this view that Congress in the "Thurman act," where, as we have said, it employs the term in its strict sense, invariably uses

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the singular “*sinking fund*,” although the fund is made up of contributions from two companies, and is expressly declared to be dedicated to certain debts of both companies, “according to the interest and proportion of said companies, respectively, therein.” (Section 8.)

It would seem, then, that we can hardly account for the use of the plural “*sinking-funds*” in section 5, by the fact that more than one company is interested in them, and no other reason than the one suggested has occurred to me for this use of the singular in one act and the plural in the other.

When we look at the language of the statute in the light of the circumstances under which it was passed, as may always be done in expounding statutes (*Platt v. Union Pacific Railroad*, 99 U. S. R., 64; *Siemens v. Sellers*, 123 U. S. R., 285; *Smythe v. Fisk*, 23 Wall, 380,) little room seems left for argument as to the meaning of Congress.

The explanation in the Senate by Mr. Thurman of the bill which afterwards became the “Thurman act” shows that the sinking-fund scheme for which it provided was based on the belief that the contemplated investments in United States 5 per cent. bonds would produce a sum sufficient to pay the first mortgage debts of the Union Pacific and Central Pacific Companies at their maturity.

But the plan of the “Thurman act” failed to work successfully, owing to the fact that the unexpected rise in the price of the 5 per cent. bonds so impaired the interest-bearing capacity of the sinking-fund investments as to make failure in the plan inevitable unless modified by some additional legislation.

Another cause that operated against the success of the sinking fund was its loss of the premiums based on the bonds that have been called in by the Government for redemption.

This state of things caused anxiety for the security of the United States as a second mortgagee, and was complained of as an injustice by the railroad companies interested in the sinking fund, because it compelled them to suffer the losses of an improvident administration of the sinking fund which they were forced to maintain.

To remedy these evils Secretaries of the Treasury have several times recommended that the “Thurman act” should

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be changed so as to authorize investments in any Government bonds and in the first mortgage bonds of the subsidized roads.

Seeing, then, that the sinking fund as invested when the act of 1887 was passed was seriously crippled, can it be supposed that Congress intended by section 5 of the act of 1887 to keep the fund as then invested in its well-known crippled condition, and so confine the remedy provided by that law to investments thereafter to be made when it was manifest that to render the remedy effective it must be operative also as to the unprofitable investments which then represented the fund? I can not bring myself to think that Congress meant to be so indifferent to the interests of the United States or so unjust to the railroad companies interested in the sinking fund.

In coming to this conclusion I am compelled to differ from the opinion on this question of my predecessor, Mr. Attorney-General Garland, dated March 31, 1887. I fail to see the force of his objection, that to hold that the Secretary of the Treasury has the power to sell the 5 per cent. bonds comprising the sinking fund on March 3, 1887, and reinvest the proceeds in the other bonds named in section 5, would expose the sinking fund to losses by opening the door to the hazards of repeated changes in the investment of such proceeds, changes which, he says, might sometimes be made with a view to merely speculative profits; because, in my judgment, the power given by section 5 to sell and reinvest the bonds in question would, if duly exercised, be as completely exhausted as the power to invest conferred by the "Thurman act." As already suggested, section 5 of the act of 1887 is purely remedial. The plain purpose of Congress was to relieve the railroad companies and the United States Government from a great financial loss, resulting from the enforced investment in securities whose net interest-bearing capacity had, by reason of unforeseen circumstances, become greatly reduced. This was the evil, and I am compelled to believe that the remedy was addressed to the whole evil, not merely to a less important part. The accumulations of nearly one half of the time provided for the growth of the sinking fund, amounting to something like \$8,000,000, were so invested as to

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bring a net interest of less than $2\frac{1}{2}$ per cent.; whereas, by re-investing in the first mortgage bonds of the railroad companies without any loss of security, the interest might, during the remaining years, be nearly doubled. Moreover, by selling the bonds already in the fund a premium of more than \$1,500,000 would be at once realized and added to the fund, whereas if these bonds were held till maturity this premium would be lost. It is not reasonable to suppose Congress was entirely overlooking this vast fund of nearly \$10,000,000, already accumulated as a principal, and was legislating solely with reference to the future accretions to the fund. Such a construction ought not to be given to the act, unless the language used renders it imperative. In my judgment neither the discretionary nor the popular definitions of the term "sinking fund" nor the general scope of the legislation upholds, much less demands, such a construction.

This brings me to the second question, which is "whether the sinking fund can be invested in the first mortgage bonds of 'any of the roads' that have received aid from the Government in bonds." The primary object of the act of 1887 was to authorize an investigation into "the working and financial management of *all the railroads* that have received aid from the Government in bonds." It appears that the companies to which Government subsidy bonds have been issued have availed themselves of the privilege, extended to them by law, of issuing bonds secured by mortgages which, it is provided, shall take precedence of the statutory lien for the security of the Government subsidy bonds, and which are the "first-mortgage bonds" referred to in section 5.

This section, which is the concluding one of the act of 1887, declares that "the sinking funds" then or thereafter held as security for the indebtedness "of either or all of said railroad companies" may be invested "in any of the first-mortgage bonds of either of said companies," and, to my mind, there is no doubt that the "railroad companies" referred to are those previously mentioned in the act as the companies whose affairs were to be investigated, and that the meaning is that the "sinking funds" may be invested in any of the first-mortgage bonds of any of the companies before mentioned in the act.

Sinking Fund of Union and Central Pacific.

If said "*companies*" means *all* the companies named before, as I am clear it does, then I do not see how we can avoid giving "*either*," in "*either of said companies*," the sense of *any*, a sense which it frequently has in acts of Congress and other writings, and in which it is previously twice used in section 5, where reference is made to the "sinking funds" held for the security "*of either or all of said railroad companies*," and where authority is given to invest said funds in any Government subsidy bonds theretofore issued for the benefit "*of either or all of said companies*." It seems clear that in both these instances "*either*" must have the meaning of *any*.

Nor does it seem to me of any significance that when Congress refers to investment in first-mortgage bonds it drops the use of the word "*all*" in connection with the word "*either*," because, as I understand the facts, no subsidy bonds have been issued for the benefit of "*all*" of said companies jointly, but for each severally, and the use of the word "*all*" in the phrase "*either or all*" is mere surplusage. Again, it is to me incredible, if the person who drafted section 5 was attempting to use words with such grammatical accuracy as is implied in the assumption that the word "*either*," as used in the first two instances in said section, means one of several, but in its third use it was designed to be limited to one of two for the purpose of excluding the bonds of all other railroads except these two, that language less equivocal should not have been used. In other words, if the purpose in the mind of the writer of this section, and of Congress in passing it, was to limit the investment of the sinking funds to the first-mortgage bonds of one of two companies instead of any of the subsidized companies, I can not believe it is possible that such a purpose would have been evinced only by such an ambiguous use of the word "*either*." The idea that such was the purpose rests upon the assumption that particular attention was drawn to the subject, and that the change in the use of this word was for that purpose. It seems to me that the use of the word "*either*" in the sense of "*any*" and the use of "*all*" without any significance shows that the legislative mind was not directed to the matter of grammatical accuracy.

Sinking Fund of Union and Central Pacific.

in framing this section, but rather that words were used in the loose popular way.

I have not overlooked the argument that there is an apparent impolicy in investing the funds of one railroad company in the mortgage bonds of another, but, except as it may throw light upon the proper construction of a statute, the question of policy is not one for this Department; and as the language of section 5 seems to demand a construction authorizing such investment, and as the statute is not mandatory, but in the end leaves the question whether such investment shall be made to the discretion of the Secretary, this argument has not seemed to me to be controlling or of great force.

Moreover, if the last use of the word "either" in this section is to be limited so as to mean one of two companies, we are met by the question, which two—a question which can not be answered by anything found in the act of 1887. By reference to the "Thurman act" and by extraneous testimony, we can, of course, learn what companies have sinking funds, but it does not seem to me that the case calls for a construction of this statute dependent upon facts derived from such extraneous sources.

I am therefore constrained reluctantly to differ from my learned predecessor upon this point also, and to conclude that the Secretary has a discretion to invest the sinking funds in question in the first-mortgage bonds of any of the railroad companies referred to in the act of March 3, 1887, as having received aid from the Government in bonds.

Respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Leases of Indian Lands.

LEASES OF INDIAN LANDS.

The Cherokee Nation of Indians can not make a valid lease of their lands without the consent of the Government. Opinion of Attorney-General Garland of July 21, 1885 (18 Opin., 235), reaffirmed.

DEPARTMENT OF JUSTICE,
February 14, 1890.

SIR: I have the honor to acknowledge the receipt of your letter of February 13, in which you say:

"I transmit herewith a letter from the Secretary of the Interior, dated the 10th instant, with an opinion of the Assistant Attorney-General of the Interior Department, under date of October 19 last, and a printed copy of a letter of the Secretary of the Interior addressed to General Lucius Fairchild, chairman of the Cherokee Commission, under date of October 26 last, and beg to ask you for an early opinion upon the question whether the leases referred to in these communications, made by the Cherokee Nation of Indians to the Live Stock Association, have any legal force or validity.

"As I am anxious for an early answer to this communication, I will not ask you to do more than to state your conclusions."

I have accordingly made such an examination of the question as the limited time allowed has permitted. This examination has been greatly facilitated by the letter of the Secretary of the Interior to General Fairchild, and by the opinion of Mr. Assistant Attorney-General Shields; this opinion containing a reference to the statutes and decisions of the courts upon the subject.

I find that on the 21st day of July, 1885, my immediate predecessor, Mr. Garland, gave an opinion to the Secretary of the Interior upon the precise question presented in your letter. His conclusion was:

"Whatever the right or title may be (in the lands in question), each of these tribes or nations are precluded, by force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States. A lease of the land for grazing purposes is as clearly within the statute as a lease for any other or for

Ad Interim Appointment.

general purposes, and the duration of the term is immaterial. One who enters with cattle or other live stock upon an Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with consent of the tribe."

In the opinion of Mr. Assistant Attorney-General Shields, upon a most elaborate examination, the same conclusion is reached. Without hesitation or doubt I concur in this conclusion.

I return herewith the letter of the Secretary of the Interior to General Fairchild, the opinion of Assistant Attorney-General Shields, and the letter of the Secretary of the Interior to the President dated February 10.

Respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

AD INTERIM APPOINTMENT.

The vacancy in the office of Paymaster-General, created by the retirement of General William B. Rochester, may be filled by an *ad interim* appointment under the provisions of section 179, Revised Statutes.

DEPARTMENT OF JUSTICE,

February 15, 1890.

SIR: I have looked at the order reciting the retirement of Paymaster-General William B. Rochester, and assigning Major Sniffen to the duties of that place temporarily. The only question I have as to the validity of the order of assignment arises from the fact that General Rochester has "retired." It is not a case of death, resignation, absence, or sickness, in the ordinary use of those terms. Sections 177, 178, and 179 of the Revised Statutes use only those terms. Still, section 1259 provides that "a retired officer shall not be assignable to any other duty" than at the Soldier's Home; though he may by section 1260 be detailed at his own request as professor of a college. The question is whether a retired officer, though not strictly within the language, is within the general scope and purpose of section 179. I think it may

Naval Court-Martial—Civilian Witness.

well be said that, in the eye of the law, a retired officer is absent, he being incapable of rendering the service required. If this construction may not be given to the act, it is clearly *casus omissus*. There would, in that event, be no power to provide for the duties of the office *ad interim*.

I think the appointment is valid.

Respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

NAVAL COURT-MARTIAL—CIVILIAN WITNESS.

A naval court-martial, or judge advocate thereof, has no power to compel a civilian who is not subject to the articles for the government of the Navy to appear and testify before such court.

Neither article 42 nor article 57 in section 1624, Revised Statutes, gives the power to compel the attendance of civilian witnesses.

The provisions of section 1202, Revised Statutes, apply only to military (*i. e.* Army) courts.

DEPARTMENT OF JUSTICE,

February 26, 1890.

SIR: I have the honor to acknowledge the receipt of your communication of February 17, in which you ask my opinion upon the following question:

"Have judge advocates of the general courts-martial or courts of inquiry organized under authority of articles 38 and 55 of the articles for the government of the Navy, and convened within the United States, power to compel civilians not subject to the articles for the government of the Navy to appear and testify before such courts?"

In answer to this question I have to say that in 1859 substantially the same question, with reference to Army courts-martial, was submitted by the Secretary of War to my predecessor, Attorney-General Black, and was answered by him in the negative. (9 Opin., 311.)

In 1863 there was attached to the sundry civil appropriation bill, among other items of general legislation, section 25, in the following language:

"*And be it further enacted*, That every judge advocate of a court-martial or court of inquiry hereafter to be constituted, shall have power to issue the like process to compel witnesses

Naval Court-Martial—Civilian Witness.

to appear and testify which courts of criminal jurisdiction within the State, Territory, or district where such military courts shall be ordered to sit may lawfully issue."

On the 2d of October, 1868, the Acting Attorney-General gave to the Secretary of War an opinion to the effect that the twenty-fifth section of the act of March 3, 1863, authorized compulsory process to be issued for the attendance of civilians as witnesses before courts-martial. (12 Opin., 501.)

Section 25 above is embodied, so far as courts-martial are concerned, in section 1202 of the Revised Statutes, but for some reason the part of the section referring to courts of inquiry is omitted in the revision.

Were it not for the use of the word "military," in sections 25 and 1202, above quoted, there would be nothing in that section to indicate that it was not designed to be equally applicable to courts-martial in the Navy as in the Army; but the use of the expression "military courts" seems to limit the effect of the act to courts-martial in the Army. Upon looking at Webster and Worcester, I find that neither of them gives the word "military" a definition which would include naval service. It seems to be confined exclusively to the Army or land service. In this restricted sense it is evidently used by Congress in the second section of the act of June 23, 1874, reorganizing the several staff corps of the Army (18 Stat., 244). It is evident also that in the compilation of the Revised Statutes such was understood to be the meaning of the word; and this section 25 of the act of 1863 is incorporated in the chapter relating to the Army, but not in the chapter relating to the Navy.

I have examined the legislation subsequent to the Revised Statutes and find nothing upon this subject. To be sure, article 42 of section 1624, Revised Statutes, provides that, "Whenever any person refuses to give his evidence, or to give it in the manner provided by these articles, or prevaricates, or behaves with contempt to the court, it shall be lawful for the court to imprison him for any time not exceeding two months."

Article 57 provides that "courts of inquiry shall have power to summon witnesses, and administer oaths, and punish contempt in the same manner as courts-martial."

Bureau Officers in the Navy Department.

But in view of what has been already said, I think it clear that neither of these articles gives the power to summon and compel the attendance of civilian witnesses. It must be remembered that a court-martial is a court of limited and special jurisdiction; that it only has such powers as are clearly conferred by statute. Nothing certainly in the way of control over civilians is to be taken in its favor by implication.

Upon the whole, therefore, it is my opinion that naval courts-martial or their judge-advocates have not the power to compel civilians not subject to the articles for the government of the Navy to appear and testify before such courts. Upon that subject I think the law with reference to naval courts-martial is now the same as it was prior to the enactment of section 25 of the statute of 1863 in reference to Army courts-martial.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

BUREAU OFFICERS IN THE NAVY DEPARTMENT.

A naval officer assigned to duty as an assistant to the chief of a bureau in the Navy Department is not authorized by section 178, Revised Statutes, in case of the death, resignation, absence, or sickness of the latter (where the President has not otherwise directed, as provided by sec. 179, Rev. Stat.), to perform the duties of such chief until his successor is appointed or until his sickness or absence shall cease.

The phrase "assistant or deputy of such chief," etc., in said section 178, is to be construed as including an assistant or deputy only whose appointment is specifically provided for by statute.

DEPARTMENT OF JUSTICE,
March 5, 1890.

SIR: You have submitted to the Attorney-General the question:

"Whether an officer of the Navy, detailed and assigned to duty by the Secretary of the Navy as an assistant to the chief of a bureau, is as such assistant, in the event of the death, resignation, absence, or sickness of the chief of the bureau, and in case the President has not otherwise directed under

Bureau Officers in the Navy Department.

the provisions of section 179 of the Revised Statutes, authorized by section 178 to perform the duties of such chief until his successor is appointed or until such absence or sickness shall cease?"

Section 178 of the Revised Statutes provides that—

"In case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, whose appointment is not vested in the head of the Department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease."

Section 416 of the Revised Statutes, which makes provision for the appointment of officers in the bureaus of the Navy Department, makes no provision for the appointment of any assistants to chiefs of bureaus. The highest officers recognized by this section in such bureaus, after the chiefs thereof, are the chief clerks, except in the Bureau of Yards and Docks, where the appointment of a civil engineer is provided for. In my opinion, in order to determine who should act in the place of the chief of the bureau during his absence, section 178 is to be read in connection with section 416.

Without making a question that the assignment of commissioned officers of the Navy to act as assistants to chiefs of bureaus may be within the general power of the Secretary of the Navy, I think that section 178, in the expression "the assistant or deputy of such chief or of such officer," can only refer to assistants or deputies whose appointment is specifically provided for by statute. There is no specific provision for the assignment of assistants to chiefs of bureaus from commissioned officers of the Navy.

The question upon which an opinion has been requested should be answered in the negative.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE NAVY.

Approved:

W. H. H. MILLER.

Co-operation of Revenue Cutters with the Navy.

CO-OPERATION OF REVENUE CUTTERS WITH THE NAVY.

The revenue cutters employed in carrying out the order issued by President Lincoln to the Secretary of the Treasury, dated June 14, 1863 (set forth in the opinion), were, while so employed, co-operating with the Navy by order of the President; and if any of the officers or seamen thereof, during such employment, were wounded or disabled in the discharge of their duty, they became entitled to be placed on the Navy pension list at the same rate of pension and under the same regulations and restrictions as are provided by law for the officers and seamen of the Navy.

DEPARTMENT OF JUSTICE,

March 5, 1890.

SIR: You have requested the opinion of the Attorney-General upon the question whether an order issued by President Lincoln June 14, 1863, to the then Secretary of the Treasury, placed the revenue cutters of the Revenue-Marine Service in such co-operation with the Navy as is contemplated by section 2757 of the Revised Statutes, so that the officers and seamen of the revenue cutters became entitled to the benefits conferred by the pension laws, and to such other special rights and privileges as belong under the statutes to the officers and seamen of the Navy during the war of the rebellion.

The order of President Lincoln referred to is as follows:

“EXECUTIVE MANSION, June 14, 1863.

“SIR: Your note of this morning is received. You will co-operate by the revenue cutters under your direction with the Navy in arresting rebel depredations on American commerce and transportation, and in capturing rebels engaged therein.

“ABRAHAM LINCOLN.

“The SECRETARY OF THE TREASURY.”

Section 2757 of the Revised Statutes is as follows:

“The revenue cutters shall, whenever the President so directs, co-operate with the Navy, during which time they shall be under the direction of the Secretary of the Navy, and the expenses thereof shall be defrayed by the Navy Department.”

You state that the expenses of the revenue cutters in carrying out the above order were defrayed by the Treasury

Co-operation of Revenue Cutters with the Navy.

Department, and not by the Navy Department. It may perhaps be inferred also from the order of the President that the cutters continue to act under direction of the Secretary of the Treasury.

It is provided by section 4741 of the Revised Statutes that—

"The officers and seamen of the revenue cutters of the United States, who have been or may be wounded or disabled in the discharge of their duty while co-operating with the Navy by order of the President, shall be entitled to be placed on the Navy pension list at the same rate of pension and under the same regulations and restrictions as are provided by law for the officers and seamen of the Navy."

It seems clear that if any of the officers or seamen of the revenue cutters of the United States were wounded or disabled in the discharge of their duty in carrying out the order of the President contained above, that is, in arresting rebel depredations on American commerce and transportation, and in capturing rebels engaged therein, such wounds or disabilities would have been suffered while "they were co-operating with the Navy by order of the President," within the language of section 4741, and that they would be therefore entitled to the benefits conferred by that section. I do not see how either the fact that the expenses of such co-operations were defrayed by the Treasury Department, or that the cutters continued to act under the Secretary of the Treasury, can affect the question. That the law was not followed in these respects by the officers of the Government can not change the character of the service, the ultimate authority under which it was rendered, or the benefits to which those suffering disabilities or wounds received therein were entitled. Nor does the fact that the order is so general as to show that the revenue cutters may have been engaged during the same period in protecting the collection of the revenue of the United States, and were only at intervals thereof co-operating with the Navy of the United States in resisting attacks of the rebels upon American commerce, prevent the latter service from being a co-operation with the Navy by order of the President. It is only necessary that the wounds or disabilities should have been incurred because of service in such co-operation with the Navy, and while it was being rendered.

CIVIL SERVICE—EMPLOYMENT OF SUBSTITUTES.

The privileges and benefits to which persons wounded in such service are entitled are stated in section 4741, namely, that they shall "be placed on the Navy pension list at the same rate of pension and under the same regulations and restrictions as are provided by law for the officers and seamen of the Navy." If this covers all the benefits and privileges to which officers and seamen of the Navy are entitled, then the question put should be answered in the affirmative; if not, then it should be answered in the affirmative with the limitations suggested.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved :

W. H. H. MILLER.

CIVIL SERVICE—EMPLOYMENT OF SUBSTITUTES.

The proposed amendment of Departmental Rule VII, and revocation of Departmental Rule II, of the regulations of the Civil Service Commission (with a view to provide for the employment of substitutes for clerks, copyists, and other employés in the Departments, who are temporarily absent on account of sickness or other unavoidable cause, and for the selection of such substitutes from persons regularly certified by the Civil Service Commission), considered in connection with section 4 of the act of August 5, 1882, chapter 389, and section 4 of the act of March 3, 1883, chapter 12⁴, and advised that while the amendment proposed is not beyond the power of the Commission, with the approval of the President, to make, yet that such amendment would be inoperative whenever it should become necessary to make an additional expenditure for the employment of the substitutes.

DEPARTMENT OF JUSTICE,
March 6, 1890.

SIR: In accordance with your request of January 30, 1890, to the Attorney-General for an opinion upon the power of the Civil Service Commission, with your approval, to adopt an amendment to Departmental Rule VII of the regulations of the Civil Service Commission, I have the honor to submit the following:

CIVIL SERVICE—EMPLOYMENT OF SUBSTITUTES.

The amendment proposed is a provision for the employment of substitutes for clerks, copyists, and employés of other grades in the service of the Departments who are temporarily absent from sickness or other unavoidable cause, and for the selection of such substitutes from persons regularly certified by the Civil Service Commission. The amendment also revokes Departmental Rule II, forbidding the employment of such substitutes.

The question suggested by the Commission in their letter to you and which is now to be answered, is whether such regulation is in violation of that part of section 4 of the act of the 5th of August, 1882 (22 Stat., 255), which provides, "That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employé shall after the first day of October next be employed in any of the Executive Departments, or subordinate bureaus or offices thereof, at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employé shall hereafter be employed at the seat of government in any Executive Department, or subordinate bureau or office thereof, or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment thereof specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services."

While there is nothing in this section which denies the power of the Civil Service Commission, with your approval, to make the amendment proposed, in my opinion such amendment would be inoperative wherever it should become necessary to make an additional expenditure for the employment of the substitutes. Section 4 of the act of August 5, 1882, already quoted, forbids the employment of any officer, clerk, etc., except only at such rates and in such numbers as may

CIVIL SERVICE—EMPLOYMENT OF SUBSTITUTES.

be specifically appropriated for by Congress, and no such officer, clerk, etc., is to be paid from any appropriation made for contingent expenses, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation for contingent expenses. There is no specific appropriation of a contingent fund for substitutes. Moreover, section 3882 of the Revised Statutes expressly provides that no moneys for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation. Where, therefore, in the employment of substitutes, an additional expenditure is required, there would be no lawful means for the payment of such substitutes.

By section 4 of the act of Congress of March 3, 1883 (22 Stat., 563, 564), it is provided that "all absence from the Departments on the part of said clerks or other employés, in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay." It is necessarily implied from this provision that pay for thirty days in any one year may be continued during the period of absence at the discretion of the head of the Department, and that, in case of sickness, pay may continue without any such limitation. It is apparent, therefore, that in nearly all cases of temporary absence, for sickness or other unavoidable cause, which are the cases covered by the amendment proposed, the pay of the absent clerk, employé, etc., would continue, and that a substitute would impose upon the Government an additional expenditure. This expense, as has been said, it would be beyond the power of the heads of the Departments to incur.

The result is that the amendment proposed is not beyond the power of the Civil Service Commission, with your approval, to make, but that, in the great majority of cases, to which by its present terms it would seem to apply, it would be by law inoperative.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The PRESIDENT.

Approved:

W. H. H. MILLER.

Chinese Exclusion.

CHINESE EXCLUSION.

The certificate required of Chinese by section 6 of the act of July 5, 1884, chapter 220, in order to establish a right to land in the United States, can not be dispensed with. It is the sole evidence admissible to establish such right.

DEPARTMENT OF JUSTICE,

March 8, 1890.

SIR: I have the honor to acknowledge the receipt of the communication of the Acting Secretary, dated March 6, embracing a copy of a telegram from F. A. Ree, Chinese consul at San Francisco, to General John W. Foster, of this city. In this telegram, among other things, it is stated that two Chinese merchants have arrived at the port of San Francisco, in the ship *China*, and desire to land; but that by reason of certain governmental regulations in China, they being residents of Hong-Kong, are unable to procure the certificate required by section 6 of the act of Congress approved July 5, 1884 (23 Stat., 116).

You ask my opinion whether, without the production of such certificate, these gentlemen may be permitted to land. I can not write an opinion that will be more plain than the statute on this subject. Section 6 is imperative in its requirement of such certificate, and provides that it shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States. This is the last expression of the law-making power of the United States on the subject, and if at variance with the provisions of the treaty with China, upon which question I express no opinion, it is still the law. (*Botiller v. Dominguez*, 130 U. S. R., 238.)

My answer to your question, therefore, is that without such certificate, consistently with the law, you can not permit the landing of these gentlemen.

Respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Indian Allottees.

INDIAN ALLOTTEES.

It is the duty of the Government to protect the Indian allottees under the act of March 2, 1889, chapter 412, in the enjoyment of their allotments, and in the discharge of that duty the military forces of the United States may, if necessary, be employed by the President for their protection.

DEPARTMENT OF JUSTICE,

March 12, 1890.

SIR: At your suggestion I have examined the opinion of Mr. Assistant Attorney-General Shields upon the question whether, under the act of March 2, 1889 (25 Stat., 998), it is competent to use the military forces in protecting the individual rights of Indians to allotments outside of the reservations, where such Indians are residing upon the lands and are being forced therefrom by trespassers; or whether, since the territory has come within the limits of South Dakota, the rights of the Indians under said State must be adjudicated by the courts; and if so, whether the United States courts will have jurisdiction. That opinion is transmitted herewith.

It is needless for me to go into an elaborate statement of my views upon this question. I concur in the conclusions of this opinion, and in the main in the reasoning by which those conclusions are reached.

On the 27th of July, 1888, Acting Attorney-General Jenks gave to the Secretary of the Interior an opinion denying to the State the power to tax lands occupied by Indians as separate allotments under the then existing legislation. There is nothing in the act of March 2, 1889, that would lead to a different conclusion, or that would make inapplicable the reasoning of that opinion. Of that opinion I hand you herewith a printed copy.

As will be seen by that opinion, the conclusions there reached rest largely upon the proposition that notwithstanding the Indians, by taking separate allotments, have made a first and a long step toward civilization and independent citizenship, yet they are still in a state of pupilage and under the guardianship of the General Government. Upon the same ground, I am clear that it has not been the intention of Congress, in any legislation so far, to put these Indians, who

Indian Allottees.

take such separate allotments, entirely upon their own resources or to withdraw the Government's guardianship, supervision, and protection. The fact, if there were no other, that their lands so allotted are made inalienable, that the allottee has no power to cumber or charge the same with debt, would be a clear indication that Congress had not intended to remit him to courts of law for the protection of those lands; for it would be worse than idle to expect that a man so untutored, so improvident, so much of a child that he can not be trusted with a control over his property, would be able, without any power to charge that property for any purpose, to protect the same in a court of law. In other words, I am entirely clear that it is the duty of the Government to protect these Indian allottees in the enjoyment of their allotments. The only question is as to the manner of such protection.

I think the opinion of Mr. Assistant Attorney-General Shields makes it entirely clear that the statute expressly authorizes the use of troops for the protection of such rights in "the Indian country." The Supreme Court has repeatedly decided that " Indian country " is all country to which the Indian title has not been extinguished. The Indian title to the lands allotted in these reservations under the act of March 2, 1889, is modified, but I do not think it can be said to be extinguished. In pursuance of treaties with the Indians the lands are partitioned in severalty to the Indians, not because the ordinary Indian title has been totally extinguished, but because the Indians have consented to such arrangement. This being so, and in view of the relation of guardianship the Government still bears, and the duty of protection it still owes to these Indians, I have no doubt of the right of the President to use the troops for the protection of these allotments.

With reference to the other question, namely, the jurisdiction of the Federal courts, in case appeal is made to the courts to settle the rights of the parties in the premises, I have no doubt these rights are derived from and ascertained by the statutes of the United States, and necessarily involve Federal questions.

Respectfully yours,

W. H. H. MILLER.

The PRESIDENT.

Postal Conventions with Foreign Countries.

POSTAL CONVENTIONS WITH FOREIGN COUNTRIES.

Upon a review of the legislation passed by Congress, from the beginning of the Government down to the present time, conferring upon the Postmaster-General power to make postal arrangements and conventions with foreign countries, and the practice of the Government thereunder: *Advised*, that such legislation and practice sanction an interpretation of the Constitution different from that which might be reached by the ordinary rules of construction were the question a new one, and that the provisions of section 398, Revised Statutes, authorizing the Postmaster-General, with the advice and consent of the President, to negotiate and conclude postal treaties and conventions between the United States and foreign countries, are not in conflict with that part of section 2, Article II, of the Constitution, giving the President "power by and with the advice and consent of the Senate to make treaties," etc.

Sembles that the right of Congress to vest in the Postmaster-General power to conclude conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails may be derived from the authority given that body in the seventh clause of section 8, Article I, of the Constitution, to establish post-offices and post-roads.

As to the power of the Postmaster-General to enter into conventions with foreign governments touching the regulation of foreign parcels post, opinion of Attorney-General Garland of June 30, 1887 (*ante*, p. 39), cited with approval.

DEPARTMENT OF JUSTICE,
March 20, 1890.

SIR: You have submitted to the Attorney-General the question whether section 398, Revised Statutes, providing that the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions between the United States and foreign countries, is in violation of that part of section 2, Article II, of the Constitution of the United States which provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

If this clause of the Constitution is exclusive, and takes from Congress the right to delegate to any one else power to conclude treaties with foreign governments, then section 398, quoted above, reposing such power in the Postmaster-General,

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eral with reference to postal treaties, would seem to be invalid. Article II is a statement of the powers of the Executive, and the ordinary rule of construction, in the absence of language to the contrary, would make the grant of a power within that article exclusive. Such a construction, however, the Supreme Court of the United States has held may be varied by the course of Congress in its legislation and the practice of the Executive Departments since the adoption of the Constitution.

In the case of *The Laura* (114 U. S. R., 411) a libel was filed by the plaintiff below against the steam-boat *Laura* to recover penalties for the violation of a statute, which were made payable to any person suing for the same. The owner of the vessel, a corporation, intervened and answered, setting up in bar a warrant in due form by the Secretary of the Treasury remitting the penalties. It was claimed in the case that the warrant of remission was without legal effect, because the statute upon which it rested was in conflict with the clause of the Constitution investing the President with power to grant reprieves and pardons for all offenses against the United States, except in cases of impeachment. This power to grant reprieves and pardons, it will be observed in passing, is in the same section, and immediately precedes the clause conferring power to make treaties. It was held by the Supreme Court, Justice Harlan delivering the opinion, that the practice in reference to remissions of penalties by the Secretary of the Treasury and other officers, which had been observed and acquiesced in for nearly a century, was an interpretation of the Constitution too strong and obstinate to be shaken or controlled, and that, therefore, the assumption on the part of Congress of the right to invest the Secretary of the Treasury with power to remit penalties in such cases was not invalid, and that, to this extent, the power reposed by the Constitution in the President to grant reprieves and pardons was not exclusive.

In *Ware v. United States* (4 Wall. 617) the question was whether a post-office, which had been discontinued by order of the Postmaster-General, was legally discontinued. By a clause in section 8, Article I, of the Constitution, Congress is given power to establish post-offices and post-roads. The

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ordinary rule of construction of governmental powers would have led to the conclusion that Congress, being charged with the duty of establishing post-offices and post-roads, could not delegate such duty to a branch of the executive department of the Government. In the case cited, however, Mr. Justice Clifford, delivering the opinion of the court, says:

"Power to establish post-offices and post-roads is conferred upon Congress, but the policy of the Government from the time the General Post-Office was established has been to delegate the power to designate the places where the mails shall be received and delivered to the Postmaster-General."

Having found that the power of the Postmaster-General to establish post-offices was justified by usage and the policy of the Government from its foundation, the court held that the power to discontinue post-offices was incident to the power to establish them, and that, therefore, the discontinuance of the post-office by the Postmaster-General was legal, notwithstanding the fact that a postmaster had been appointed by the President, by and with the advice and consent of the Senate, for a term of four years, which had not expired at the time of the discontinuance of the post-office.

Another case which illustrates the same principle, although it involved only the construction of a statute, is *United States v. Hill* (120 U. S. R., 169), where the question was whether the clerk should include fees in naturalization proceedings in his returns of emoluments. It was shown to have been the custom in the United States courts in Massachusetts, from 1839 to 1884, to charge \$3 as fees in such proceedings, and not to include them in the returns. It was held that the interpretation of the statute by judges, heads of Departments, and accounting officers, cotemporaneous with the passage of the law and continuous, was one on which the obligors in the bond of the clerk had a right to rely, and it not being clearly erroneous, would not now be overturned.

It seems to me apparent, then, from the cases cited, that where long usage, dating back to a period cotemporary with the adoption of the Constitution, sanctions an interpretation of that instrument different from that which would be reached by the ordinary rules of construction were the question a new one, the usage will be followed. It becomes important, there-

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fore, in determining the question here to be answered, to trace from the beginning of the Government, if possible, the course of legislation out of which section 398 was developed and the practice of the Post-office Department with reference to the subject matter of that section.

After the Declaration of Independence, the only reference we can find to foreign mails, and the practice in regard to them, is on page 47 of the sixth volume of the Journals of Congress, of May 5, 1780, in which it is provided that "all masters of packets and other vessels in the Continental service be and they are required to lodge whatever letters they bring from abroad in the post-office nearest to the port at which they arrive, and immediately after their arrival."

I can find no trace of any arrangement with foreign governments by the Congress under the articles of confederation. From 1789, when the Constitution was adopted, until 1792, the post-office as it had been established under the articles of confederation continued without any legislation, except a simple provision that it should be conducted as it had been before the adoption of the Constitution. On February 20, 1792, Congress passed an act (1 Stat., 231) establishing a Post-Office Department and vesting certain powers in the Postmaster-General. Section 26 of that act was as follows:

"That it shall be lawful for the Postmaster-General to make provision where it may be necessary for the receipt of all letters and packets intended to be conveyed by any ship or vessel beyond sea, or from any port in the United States to another port therein; and the letters so received shall be formed into a mail, sealed up, and directed to the postmaster of the port to which such ship or vessel shall be bound, and for every letter or packet so received there shall be paid at the time of its reception a postage of one cent, which shall be for the use of the postmasters respectively receiving the same. And the Postmaster-General may make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets through the post-offices."

The act of 1792 expired by limitation in 1794, in which year, upon May 8, a permanent act was passed establishing the Post-Office Department, containing the same provision

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quoted above, in its section 26 (1 Stat., 354). This last act continued in force until April 30, 1810, when another act was passed for the organization of the Post-Office Department, which in section 32 (2 Stat., 603) contained the same provision quoted above. This section was repeated in the act of March 3, 1825 (4 Stat., 112), and continued in force until the act of March 3, 1851. Before the repeal of the section quoted, however, by a joint resolution approved June 15, 1844 (5 Stat., 718), Congress authorized the Postmaster-General—

“To make such arrangements as may be deemed expedient with the post office department of the British Government for the transmission of the British mail in its unbroken state or condition between Boston and Canada;” and

“To enter into such arrangement or arrangements with the proper authorities in France and Germany, and the owners or agents of the vessels plying regularly between those countries and the United States, whereby a safe and, as near as possible, a regular and direct mail communication, under official guaranty, between the United States and the continent of Europe, viz, the ports of Bremen in Germany, and Havre in France, and such other principal ports on said continent as the Postmaster-General shall deem proper, shall be secured, so that the entire inland and foreign postage on letters and all other mail matter sent over sea from and to the United States, to and from any port of France, and of the States comprehended within the German Customs Union, and of those countries of the continent between which and France and the said German States there exists a continued arrangement of the like kind, may be paid at the place where they are respectively mailed or received.”

On December 15, 1848, a postal convention was concluded with Great Britain, which was signed by George Bancroft for the United States and Lord Palmerston for Great Britain, and was concurred in by the Senate. Ratifications were exchanged January 26, 1849. (2 Stat., 966, 967.) It was provided that all measures of detail arising out of the stipulations should be arranged by the post-office of the United States and the British post office and should be modified whenever the two post-offices deemed it expedient. This postal convention between the United States and Great Brit-

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ain is the only one in the history of the country which has been concurred in by the Senate. By the act of March 3, 1851, already referred to, the section which had been in force since 1792, and which is quoted above, was repealed; and as part of section 2 of that act was enacted the following (9 Stat., 589):

“And the Postmaster-General, by and with the advice and consent of the President of the United States, shall be and he hereby is authorized to reduce or enlarge from time to time the rates of postage upon all letters and other mailable matter conveyed between the United States and any foreign country, for the purpose of making better postal arrangements with other governments, or counteracting any adverse measures affecting our postal intercourse with foreign countries.”

The part of the section just quoted continued in force until the act of June 8, 1872, when by section 167 of that act (17 Stat. 304) it was provided:

“That for the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries.”

By section 103 of the same act it was provided:

“That the Postmaster-General may conclude arrangements with the postdepartments of foreign governments, with which postal conventions have been or may be concluded, for the exchange, by means of postal orders, of small sums of money not exceeding fifty dollars in amount, at such rates of exchange, and compensation to postmasters, and under such rules and regulations as he may deem expedient; and the expenses of establishing and conducting such system of exchange may be paid out of the proceeds of the money-order business.”

Section 273 of the same act authorized the Postmaster-General, by and with the advice and consent of the President, to make any arrangements which he deemed just and expedient with Canada, or any other country adjoining the

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United States, by which each of the two contracting countries should have the right to carry mail over the other's territory, and carry the mail unbroken from one point in its own territory across the territory of the other back to a point in its own territory.

In 1873 section 167 of the act just quoted became section 398 of the Revised Statutes, section 103 became section 4028, and section 273 became section 4012, without change in their language, and are to-day the law.

It will be seen from the history of these sections that by a process of evolution the power which was given to the Postmaster-General to make arrangements with foreign postmasters with reference to the reciprocal receipt and delivery of mails grew into a power to conclude treaties upon postal matters, at least so far as fixing the rates of postage between two countries.

I have not been able in an examination of the records at hand to find what arrangements were made between the Postmaster General of this country and foreign postmasters in the early years of the Government. That there were arrangements must be presumed, and that they were observed as binding on the respective governments of the contracting postmasters there is no reason to doubt.

It will be noted that until the act of June 8, 1872, the arrangements between the Postmaster-General and the post-office departments of other countries were not dignified by the name of "postal conventions" or "treaties." As the Statutes at Large include only treaties and conventions, the failure of the law to describe postal arrangements as such, with foreign countries, until 1872, explains why there is no record of such arrangements in the Statutes at Large until the eighteenth volume, part 3, covering the treaties from December, 1873, to March, 1875. In that volume we find a record of a postal convention between the United States and Sweden and Norway, entered into by the Postmaster-General, with the advice and consent of the President, signed March 15, 1873. Also the record of what is called "A second additional convention to the postal convention of August 21, 1867, between the United States and Belgium," signed by the Postmaster-General May 9, 1873, and approved by

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the President May 12, 1873. This shows that a postal convention had been entered into with Belgium in August, 1867, no record of which appears in the Statutes at Large. In the same volume (18 Statutes at Large) are recorded postal conventions with other countries, which, by their terms, are modifications of former postal conventions entered into by the Postmaster-General.

It is fair to presume from the material at hand, therefore, that from the legislation of 1792 above given upon this subject down to the present time the Postmaster-General, by the authority conferred in the acts of Congress to which reference has been made, has exercised the treaty-making power of the Government in so far as it was necessary to the improvement of the foreign mail service, and that, with the single exception of the postal treaty of 1848 between England and this country, to which reference has been made, the concurrence of the Senate has not been deemed necessary to the validity of such treaties. The powers of the Postmaster-General in this regard under the present statutes are larger, and at the same time better defined, than they were in the act of 1792, but the general character of the power, that is, of binding the Government by a contract with a foreign nation with reference to interpostal conveniences, has not been changed.

From the foundation of the Government to the present day, then, the Constitution has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the Postmaster-General power to conclude conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails. The existence of such a power in Congress may, perhaps, be worked out from the authority given to that body in the seventh clause of section 8, of Article 1, of the Constitution, to establish post-offices and post-roads. This has always been construed to mean power to organize and carry on the Post-Office Department. Foreign mail is so closely connected with a proper system of inland mail as that the power to organize and carry on a general post-office system would seem to imply a power to organize, in connection therewith, a system of

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foreign mails, and, in the maintenance of such a system, a power to conclude contracts with the post-office departments of other countries. The delegation of these implied powers by Congress to the Postmaster-General, sanctioned by usage since the adoption of the Constitution, on the principles laid down in the case of *Ware v. United States, supra*, has acquired constitutional validity.

For the reasons given, I am of the opinion that sections 398, 4012, and 4028, of the Revised Statutes, are constitutional and valid.

The further question, whether the power so conferred authorizes the Postmaster-General to enter into conventions with foreign governments, by which in a foreign parcels post the limit of weight may be extended to packages of not more than 11 pounds, has already been answered by Attorney-General Garland in his opinion of June 30, 1887, and calls for no other response than a reference to that opinion, where the conclusion is stated that under section 398 the authority conferred will justify the entering into a convention of the character above stated.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved:

W. H. H. MILLER.

POSTAL GUIDE.

The determination of what shall be the contents of the Postal Guide rests entirely with the Postmaster-General.

DEPARTMENT OF JUSTICE,
March 22, 1890.

SIR: In reply to your communication requesting an opinion as to whether you may legally publish the whole or any part of your annual report in the official publication called the Postal Guide, I beg to say that, in my opinion, it rests with you entirely, under the law, to determine what shall be

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the contents of that publication. Upon that matter your judgment is final, as a necessary consequence from your position as the head of the Post Office Department and from the absence of any law regulating the subject.

What has been already said makes, perhaps, the question contained in the concluding paragraph of your communication no longer of practical importance. If, however, I am mistaken in this and you still desire an expression of opinion on that question, I should thank you to lay before me the exact state of facts to which the question applies, as I am limited by law to such questions of law as arise in the course of official administration.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

WISCONSIN RAILROAD LAND-GRANTS.

The claim of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company (successor of the Chicago and Northwestern Railroad Company) to certain lands under the land-grants made to the State of Wisconsin by the acts of June 3, 1856, chapter 43, and May 5, 1864, chapter 80, considered.

DEPARTMENT OF JUSTICE,

April 7, 1890.

SIR: By the act of Congress approved June 3, 1856, it was provided, "That there be and is hereby granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix River or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, to Bayfield, every alternate section," etc.

By another act, approved May 5, 1864, additional land was granted to the State of Wisconsin upon the same terms, for the purpose of extending the road from the St. Croix River to the west end of Lake Superior.

It is further provided that the said lands, thereby granted to the said State, shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other.

By subsequent sections of these acts it is provided that if

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the said roads are not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

By an act of the legislature the State of Wisconsin accepted these grants and assumed the execution of the trust. The route of the road was surveyed and a map of its location was filed in the Land Office at Washington.

A trespasser cut a large amount of logs upon these lands and had them in a boom, with other logs, at Stillwater, Minn. An agent of the State seized these logs, claiming them as the property of the State. Schulenberg, who had cut and claimed to own the logs, brought replevin against Harriman, agent of the State, and the case is reported in 21 Wallace, at page 44. By that decision it is settled:

First. That this was a grant *in presenti*, passing the title of the land to the State so soon as the survey enabled a definite location to be made.

Second. That the fact that no part of the road had been built was immaterial; that the lands were granted upon a condition subsequent; and that until the Government, either by act of Congress or by a suit duly commenced, re-asserted its claim to the lands, the title to the State was good. As a consequence, it was held that the agent of the State was entitled to hold the logs.

It is my understanding that it is under this grant that the Chicago and Northwestern Railroad Company, through the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, is claiming the 42,000 acres of land which you are now asked to patent.

This suit was decided in the Supreme Court in 1874, nearly twenty years after the original grant. When the case was tried the road was still not constructed, but that was held to be immaterial.

In the *St. Louis, etc., Railway Co. against McGee* (115 U. S. R., 469) it is held that in order that an act of Congress should work a reversion to the United States for condition broken of lands granted by them to a State to aid in internal improvements, the legislation must directly, positively, and with freedom from all doubt or ambiguity, manifest the intention of Congress to re-assert title and resume possession.

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In *Van Wyck against Knevals* (106 U. S. R., 360) it is held: "Failure to complete a railroad according to the conditions of a grant of lands to the company, which has already attached, can be asserted as a forfeiture of the grant only by the grantor, the United States, through judicial proceedings or through the action of Congress."

In the *St. Paul, etc., Railroad against the Winona, etc., Railroad* (112 U. S. R., 720) and in the *Sioux City, etc., Railroad against the Chicago, etc., Railroad* (117 U. S., 406) it is held: "In grants of lands to aid in building railroads the title to the lands within the primary limits within which all the odd or even sections are granted relates, after the road is located according to law, to the date of the grant; and in cases where these limits, as between different roads, conflict or encroach on each other, priority of date of the act of Congress and not priority of location of the lines of road gives priority of title."

In 1880, a controversy having arisen between a number of railroad companies claiming lands under these two grants of 1856 and 1864, the Madison and Portage Railroad Company filed its bill of complaint in the circuit court of the United States for the western district of Wisconsin against the several other railroad companies claiming such interests and the treasurer of the State of Wisconsin, for the purpose of settling the rights of the parties in the premises. A cross-bill was filed by the Wisconsin Railroad and Farm Mortgage Company, another party claiming an interest, and still another cross-bill by the West Wisconsin Railway Company. The principal matters in controversy in that suit appear to have been as to the rights of these various railroad companies within the indemnity limits along the lines contemplated by the grants of 1856 and 1864. The United States Government was not a party to these proceedings, and of course no question was settled in the case as between the United States Government and any of these parties, but throughout the litigation the validity of the grants and the right to have the lands patented and applied to the construction of the road, according to the terms of these grants, is assumed. A hearing was had in the case before Judges Harlan, Drummond, and Bunn, and a decree made directing

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and adjudicating the rights of the various parties to lands under these grants, upon the assumption of their validity. No question seems to have been made upon the point that the roads were not completed within the times limited in the granting acts.

On March 3, 1887, Congress passed an act (24 Stat., 556) the first section of which reads as follows:

"That the Secretary of the Interior be and he is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad grants made by Congress to aid in the construction of railroads and heretofore unadjusted."

The second section of the act requires the Secretary of the Interior, in any case where lands have been erroneously patented to aid in the construction of a railroad, to demand the relinquishment of the same, and upon a failure to obtain such relinquishment within ninety days it is made the duty of the Attorney-General to commence and prosecute a suit to cancel such patents, certifications, or other evidences of title, etc.

Section 4 of that act requires that where lands were erroneously certified or patented, having been sold by the railroad company to purchasers in good faith, patents shall issue from the United States to such purchasers, but the railroad company shall be liable to the Government for such purchase money, and it is made the duty of the Attorney-General in case of neglect or refusal of the company to pay over the sum to commence suits for such purchase money.

This being the state of the law, on the 22d of March, 1887, nineteen days after the above act was approved, Secretary Lamar gave an opinion (5 Decisions of the Department of the Interior relating to public lands, p. 511) reversing the action of the Commissioner of the General Land Office (Sparks) with relation to these lands. Commissioner Sparks, it seems, was denying the title of the railroad companies to these lands, and was insisting that suits should be instituted by the Attorney-General against the railroad companies, their officers and agents, to restrain them from cutting or disposing of timber upon any lands selected or claimed as indemnity lands or being within withdrawn indemnity limits; and further, to recover the value of timber cut, and that these

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officers, agents, etc., be proceeded against criminally. The Secretary in reversing Commissioner Sparks's decision recited a former decision of the Secretary, reversing a former decision of the Commissioner (5 L. D., 80), and states that the selections made by the Farm Mortgage Company, the claimant in that former case, having since been approved, all question relating to the lands therein must be eliminated from the matter now under consideration. The Secretary thereupon recites the history of these land grants, citing the decision in *Schulenburg against Harriman (supra)* and his own former decision, and says:

"I therefore decline to concur in your recommendations to the Attorney-General, but, on the contrary, I have to direct that you cause said railroad grant to be forthwith adjusted, and transmit for my approval, in the customary form, proper lists of lands, subject to selection and selected by said company, within the indemnity limits of said grant."

To save copying I bring you the book containing these decisions.

I am advised that for many years this railroad company has been operated as a land-grant railroad; that the Government has been adjusting its accounts with it as such; that while it was not constructed within the time limited in the original grant, the Government did not see fit, prior to the construction of the road, to take advantage of that fact, nor has it attempted to do so since.

Under the circumstances, therefore, if there is any reason why these lands ought not to be patented to the railroad company, in pursuance of the ruling of the Secretary of the Interior, as above set forth, it has not been brought to my attention.

If it be the fact, as it is represented, that the Government has been using this railroad as a land-grant road, and settling its accounts for transportation over the same upon that basis, then, unless a rule directly at variance with that enforced between private parties is to prevail, the Government is estopped to insist upon forfeiture now (*Warville on Vendors*, 450; *Ludlow against New York and Harlem Railroad Company*, 12 Barbour, 440; *Kenner against American Contract Com-*

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pany, 9 Bush, 202). But the Supreme Court has very recently held that in matters of this kind "the rights of the Government depend upon the same general principles which would authorize a private citizen to apply to a court of justice." (*United States against San Jacinto Tin Company*, 125 U. S. R., 285.)

I can not doubt, therefore, unless I am misinformed as to the facts, that this railroad company has the absolute right to these lands; and to withhold them is not only to violate the law, but the will of the law-making power as expressed in the statute above cited.

Respectfully yours,

W. H. H. MILLER.

The PRESIDENT.

CUSTOMS LAWS—CLASSIFICATION.

Steel chains used for bicycle gearing should be classified for duty under paragraph 171 (not under paragraph 216) of the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,

April 8, 1890.

SIR: In a letter of March 22, 1890, you have requested the opinion of the Attorney General upon the question whether so-called steel chainis (bicycle gearing), imported by William Read & Sons, should be classified under paragraph 171 or under paragraph 216 (T. I. new) of the tariff act of March 3, 1883. The inclosures which accompany your request show that the question is pending before your Department on appeal from the decision of the collector of customs at Boston by which he classified the articles in question under paragraph 216 "as manufactures, articles or wares, not specifically enumerated or provided for in this act, composed wholly or in part of * * * steel." The protest and appeal of the importers, William Read & Sons, which is also inclosed, is on the ground that the articles in question should have been classified under paragraph 171, which imposes a duty upon "Chain or chains of all kinds, made of iron or steel, not less than three-fourths of one inch in diameter, one and three-quarter cents per pound; less than three-fourths of one inch and not less than three-eighths of one

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inch in diameter, two cents per pound ; less than three-eighths of one inch in diameter, two and one-half cents per pound."

In addition to the protest and appeal of William Read & Sons, your request is accompanied with a letter from the collector of customs at Boston, an opinion by J. C. Bighu, assistant appraiser at the port of New York, a letter from Charles McClelland, special deputy collector at the custom-house, New York, a pamphlet containing the opinion of your Department, No. 9673, with reference to the proper classification of the articles in question, and a sample of the chain imported.

In my opinion the appeal of the importers must be sustained.

Worcester defines a chain to be "a series of connected links or rings." An examination of the sample of the gearing chain, which accompanies your request, shows beyond question that it is a chain, within this definition. The opinion of your Department, No. 9673, in describing the article, says that the links thereof have no uniform diameter, every second link being flat, and the other links being round at the ends and flat in the middle; but said links are joined by rivets passing through the ends of the flat links and the round parts of the others, and that the links have been milled and riveted together subsequent to their being forged. This description does not take the article out of the definition given by Worcester above, for, however the links are joined, they remain "a series of connected links."

Assistant appraiser Bighu bases his decision that these articles can not be classified under paragraph 171 on the ground that the rate of duty therein imposed is dependent on the diameter of the iron or steel constituting the links; and that to come within the scope of this provision, therefore, the character of the links forming the chain should be of such uniform shape that in their measurement the diameter could be readily determined.

It may be said, as conclusive of the fallacy of this argument, that paragraph 171 imposes a duty on "chain or chains of all kinds," and that there is no limitation whatever with reference to the uniformity of size of the links, or the material composing the links, or the manner in which they are connected.

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The fact that the duty in paragraph 171 is made to vary inversely as the diameter of the chain may impose upon the appraising officer the solution of a difficult question with respect to the rate to be assessed on certain kinds of chains, but such difficulty can not in my opinion form any ground whatever for excluding from so general a class as "chain or chains of all kinds" an article which is undoubtedly a chain. It is true that if evidence could be adduced to show that the article here in question was not known as a chain in trade or commerce, that fact would exclude the subject of this discussion from paragraph 171; but in the absence of evidence to that effect the article must be classified under its ordinary, everyday name. Instead of there being evidence to show that the article is not known as a chain, the letters and circulars which accompany the protest of the importers show beyond question that the articles are known in trade and commerce as chains.

I have the honor, therefore, to recommend that the appeal of William Read & Sons be sustained; that the articles imported be classified as chains, under paragraph 171 of the tariff act; and that the opinion, No. 9673, heretofore rendered by your Department, directing a different classification, be modified accordingly.

The inclosures above referred to are herewith returned.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

Assignment of Judges in Arizona.

ASSIGNMENT OF JUDGES IN ARIZONA.

Under the organic law of the Territory of Arizona and the statutes passed by the legislature thereof, the governor is not invested with power to assign to their respective districts the judges appointed for that Territory.

The authority given the governor by section 1873, Revised Statutes, was intended to be exercised only during that period which is embraced between the date of the organization of the Territory and the time when legislative action was had upon the subject-matter referred to in that section. After such action by the legislature the authority terminated and the operation of the section ceased.

DEPARTMENT OF JUSTICE,
April 8, 1890.

SIR: On February 18, 1890, you referred to the Attorney-General for his opinion the question whether the governor of Arizona, under the organic law of that Territory and the statutes passed by its legislature, has the power to assign the supreme court judges of the Territory, who by law are required to act as judges of the district court, to their respective districts. Your request is accompanied by an opinion of Assistant Attorney-General Shields to the effect that such power is reposed in the governor by act of Congress.

Sections 1873, 1913, and 1918 of the Revised Statutes of the United States, part of the organic law of the Territory of Arizona, provide as follows:

Section 1873: "Temporarily, and until otherwise provided by law, the governor of every Territory which may be hereafter established shall define by proclamation the judicial districts of such Territory, and assign the judges appointed for such Territory to the several districts, as well as fix the time and places for holding courts in the respective counties or subdivisions of each judicial district."

Section 1913: "The legislative assemblies of New Mexico, Washington, Colorado, Dakota, Arizona, and Wyoming Territories, respectively, may organize, alter, or modify the several judicial districts thereof in such manner as each legislative assembly deems proper and convenient."

Section 1918: "The legislative assemblies of New Mexico, Washington, Colorado, Dakota, Arizona, and Wyoming Ter-

Assignment of Judges in Arizona.

ritories may assign the judges appointed for such Territories, respectively, to the several judicial districts thereof in such manner as each legislative assembly deems proper and convenient."

These sections of the Revised Statutes were derived from section 16 of the act of September 9, 1850 (9 Stat., 452), and were in force substantially in the same form at the time Arizona became an organized Territorial government.

Chapter 44 of the Compiled Laws of Arizona (1877), page 392, shows that after the organization of the Territory its legislature, in accordance with the powers conferred by the organic law above quoted, defined the three districts of the Territory in which district courts were to be held, and assigned a district to each of the then judges of the supreme court by name.

By the act approved December 30, 1865 (to be found in chapter 44 of the Compiled Laws of Arizona, page 392), it was provided that—

"Whenever a district judge has been or shall be appointed to fill a vacancy in this Territory, he is hereby assigned to the district of the judge in whose place he has been appointed."

By the act of revision, which went into effect in 1887, chapter 44 was repealed (Rev. Stat., 1887, pp. 567 and 588), and in the Revised Statutes now in force the only provision with reference to the assignment of judges of the supreme court to the different districts is found in section 600, page 158 of the Revised Statutes of Arizona, 1887, by which it was enacted :

"That there shall be three district courts in this Territory, to be established by law; and a judge of the supreme court shall be assigned to and hold the courts in each of such districts."

Sections 623, 624, 625, and 626 define the limits of the three judicial districts. Nowhere in the Revised Statutes is there any provision as to the way by which judges are to be assigned to districts.

The question now to be answered is: Does the power to assign judges revert to the governor under section 1873 of the Revised Statutes of the United States, the same being part of the organic law of the Territory ?

Assignment of Judges in Arizona.

The ground upon which Mr. Assistant Attorney-General Shields rests his opinion that the governor now has the power of assignment is stated by him as follows:

"As there is now no Territorial legislation regulating the matter of assignment, I am of the opinion that the authority to make the necessary assignment rests where it was placed by section 1873 of the United States Revised Statutes, namely, in the governor, to be exercised by him temporarily and until otherwise provided by law.

"That an assignment shall be made is an essential prerequisite to the authority of the district judge (sec. 600, Arizona Rev. Stat., 1887), and it is not to be presumed that the exercise of such judicial authority is to remain suspended until a session of the Territorial legislature; nor can it be said that because the legislature at one time prescribed a rule by which the order of succession was declared, in case an appointment was made to fill a vacancy, that such order is to be followed now, after the repeal of said legislative rule."

I most respectfully dissent from the conclusion of Mr. Assistant Attorney-General Shields upon the question involved.

Section 1873 of the Revised Statutes of the United States is in its terms a temporary provision, and one which is to have effect only during that period which is embraced between the date of the organization of the Territory and the time when legislative action is had upon the subject-matter referred to in the section. The expression "until otherwise provided by law" seems to me manifestly to mean that after action by the legislature this section is to have no effect. To have the meaning which is attributed to it by the Assistant Attorney-General, it must be held equivalent to the expression "and when not otherwise provided by law." To make the two expressions equivalent is to do violence to the language used in the section, which no dilemma, however great, caused by a failure of the legislature to take necessary action, will justify. Section 1873 is a part of the organic law governing the Territory of Arizona, and has close analogy, therefore, to the constitution of the State. (*National Bank v. County of Yankton*, 101 U. S., 129). Where a constitution is established, or a new constitution is adopted, it often becomes necessary for the constitutional convention to make pro-

CIVIL-SERVICE—CERTIFICATE FOR RE-INSTATEMENT.

vision for the interval between the time when the new constitution goes into effect and the time when the legislature can enact the necessary laws to carry its provisions into effect. Such temporary provisions are ordinarily known as the Schedule (*State, ex rel. Attorney-General, v. Taylor*, 15 O. S., 142.) When the legislature has acted, and the laws have been passed putting into operation the new constitution, it would hardly be claimed that the Schedule could be revived to make up for the failure of legislative action thereafter. In such a case the Schedule would have served its purpose in filling the hiatus caused by the adoption of the new constitution and the necessary delay in legislative action thereunder. After legislative action it has no force. Such is the case with section 1873. It lost its force as part of the organic law of the Territory of Arizona when the first legislature of Arizona took action upon the subject-matter which it embraced. It had then discharged its function and was of no force whatever so far as that Territory was concerned.

The result is that the governor of Arizona has no power to make assignments for the judges.

The papers you inclosed are herewith returned.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

CIVIL SERVICE—CERTIFICATE FOR RE-INSTATEMENT.

A person who served as a contract surgeon, in the late war of the rebellion, with troops in the field and in hospitals, and by completing his contract was honorably discharged the service, is within the proviso to Departmental Rule X of the Civil-Service Rules and Regulations, and entitled to the benefits thereby conferred.

DEPARTMENT OF JUSTICE,
April 8, 1890.

SIR: In a letter of February 27, 1890, at the instance of the Civil Service Commission, you requested the opinion of the Attorney-General upon the question "whether contract

CIVIL SERVICE—CERTIFICATE FOR RE-INSTATEMENT.

surgeons are entitled to the benefits contingently conferred upon certain persons by the proviso to Departmental Rule X of the Civil Service Rules and Regulations." Your letter is accompanied by a correspondence between the Secretary of the Interior and the Civil Service Commission, in which the Secretary requests the necessary certification, under this Rule X, for the re-instatement of Dr. Harvey E. Bowles, as a clerk of Class 1 in the Pension Office, said Bowles having been dismissed to take effect February 28, 1886, and no record of delinquency or misconduct on his part appearing in the office. The request was based on the statement of the Secretary that Bowles had served in the Union Army from April 21, 1864, to July 6, 1865, ten months in the hospital service, and the remainder of the time at Fort Whipple. The Civil Service Commission requested a statement from the War Department of the military service and hospital record of Dr. Bowles, and were informed by that Department that its records showed that on April 21, 1864, Harvey E. Bowles's contract with the Government as surgeon began, and that it terminated on the 6th of July, 1865. In answer to the request of the Commission to be informed "whether this man's service is considered by the War Department as an army service, whether persons occupying the position of 'contract surgeon' were considered a part of the military force of the United States during the late war," the War Department replied that contract surgeons were not considered as a part of the military forces of the United States during the late war. In consequence of this statement and opinion from the War Department the certificate requested by the Secretary of the Interior was refused by the Civil Service Commission. On December 20, 1889, Bowles requested that the Civil Service Commission be again asked to furnish the necessary certificate of his re-instatement, and accompanied that request with written orders issued to him as acting assistant surgeon of the United States Army, while he was fulfilling his contract as surgeon with the Government, as evidence in his behalf.

Departmental Rule X is as follows:

"Upon requisition of the head of a Department, the Commission shall certify for re-instatement in said Department,

Civil Service—Certificate for Re-instatement.

in a grade requiring no higher examination than the one in which he was formerly employed, any person who, within one year next preceding the date of the request, has, through no delinquency or misconduct, been separated from the classified service of that Department: *Provided*, That certification may be made, subject to the other conditions of this rule, for the re-instatement of any person who served in the military or naval service of the United States, in the late war of the rebellion, and was honorably discharged therefrom, without regard to the length of time he has been separated from the service."

I am of the opinion that the question put by you should be answered in the affirmative, and that Dr. Bowles is entitled to the benefits conferred by the proviso in Departmental Rule X just quoted. An examination of Winthrop's Digest of the Opinions of the Judge-Advocate-General, under the title "Acting Assistant" or "Contract" Surgeon, page 102, shows that a contract surgeon was a physician under a special contract for his personal service as a medical attendant to the troops; that contract surgeons were employed because there were not enough medical officers of the Army to attend all the posts; that they were amenable to the military jurisdiction when employed with the Army in time of war, but that they were civilians without military rank and status, and were not a part of the military establishment; and that when not serving with troops before the enemy they had no other relation to the military organization of the Government than that established by the terms of their contracts.

The orders issued to Dr. Bowles show beyond question that he was an acting assistant or "contract" surgeon rendering service to the troops in the field before the enemy during the late war.

It has already been decided in an opinion of the late Solicitor-General Chapman, approved by Attorney-General Miller, of date November 19, 1889, that the proviso of Departmental Rule X, here in question, was not limited in its application to persons who served during the rebellion in the Army of the United States, within the statutory definition of that term given in section 1094 of the Revised Statutes, and it was there held that the clerks and employés on the public buildings in

Civil Service—Certificate for Re-instatement.

Washington who were organized into companies under the direction of General Wadsworth, and who served in what was known as the "Quartermaster's Brigade," who were uniformed, armed, equipped, and drilled, and were employed in scouting and other duty, although not regularly enrolled and enlisted in the Army of the United States, and not honorably discharged from such enlistment within the technical meaning of that term as used with reference to the release of regularly enlisted soldiers in the Army of the United States, were nevertheless within the proviso of said Rule X, and must be held, within the language of that proviso, "to have served in the military service of the United States in the late war of the rebellion," and to have been honorably discharged therefrom.

It seems to me that it is not possible to distinguish in principle the case of the quartermaster's volunteers from that of the contract surgeons, provided the latter, as was the case with Bowles, took the place and performed the duties of regularly enrolled surgeons on the field and in the military hospitals. The proviso to Rule X is to be construed liberally, as a grateful recognition of patriotic service. If it had been the intention of the Commissioners and the President who approved the proviso to have limited its operation to regularly appointed officers and regularly enlisted soldiers of the Army of the United States, it would have been easy to have so framed its terms, and the conclusion would have then been reached which Attorney-General Devens found necessary in his opinion of September 22, 1878 (16 Opin., 147). Bowles served the Government of the United States as a surgeon from April, 1864, to July, 1866, and during that time there is no reason to suppose that his service was not as dangerous, his labor not as irksome, and the physical and mental strain upon him not as great as it was in the case of any regularly appointed surgeon of the Army engaged on the field of battle, in the military hospitals, or at military forts during the same period.

In the analogous case of pensions (for the principle upon which pensions are granted, and this proviso was inserted, is the same) we find that a contract surgeon who was disabled by any wound or injury received, or disease contracted

CLAIM OF THE STATE OF MASSACHUSETTS.

in the line of duty, while actually performing the duties of assistant surgeon, or acting as assistant surgeon with any military force in the field, or in transitu, or in hospitals, is entitled to receive a pension as a beneficiary under the pension laws. (See Rev. Stat., sec. 4693.) By opinion of September, 26, 1882, Acting Attorney-General Phillips decided that a contract surgeon who was making his preparations to leave St. Louis for Cairo, Ill., there to go on duty as a contract surgeon, and who died from typhoid fever, was "in transitu" within the meaning of this provision. The same liberality of construction requires that Dr. Bowles should be held to have served in the military service of the United States, and, by the completion of his contract with the Government, to have been honorably discharged from such service.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

W. H. H. MILLER.

CLAIM OF THE STATE OF MASSACHUSETTS.

The claim of the State of Massachusetts for re-imbursement of expenses incurred in the payment of State militia called out by the governor, at the request of the military authorities of the United States, to aid in suppressing the "draft riots" in the city of Boston, is allowable under the provisions of the act of March 3, 1863, chapter 75, and the regulations prescribed by the President agreeably thereto, as an expense connected with the enrollment and draft authorized by that act. This claim is also within the scope of the act of July 27, 1861, chapter 21, and the supplemental resolution of March 8, 1862 [No. 16], and may properly be examined and adjusted by the accounting officers of the Treasury under the provisions thereof.

DEPARTMENT OF JUSTICE,
April 19, 1890.

SIR: By letter of March 17, 1890, you have requested the opinion of the Attorney-General upon two inquiries propounded by the Second Comptroller of the Treasury, with reference to the adjustment and allowance of the claim of the

Claim of the State of Massachusetts.

State of Massachusetts for re-imbursement by the Government of the United States for expenses incurred by the State in payment of troops of the State militia ordered out by Governor Andrew to suppress what were known as the "draft riots" in Boston. Your letter is accompanied by a communication from the Second Comptroller, setting forth the facts and the questions to be answered.

The questions are as follows:

"First. Is the claim of the State thus presented, and approved at the War Department, within the scope of the acts of July 17 and 27, 1861, and one that may properly be examined and adjusted by the accounting officers of the Treasury under the provisions of said act?

"Second. Are the expenses incurred by the State as aforesaid now (by reason of their approval by the War Department) re-imbursable under the act of March 3, 1863, which provides (section 16) that expenses connected with the enforcement of the draft, when so approved, shall be paid out of the appropriation of said act; the account to be adjusted by the accounting officers and reported to Congress as a deficiency?"

The facts are briefly these:

By the act of Congress approved March 3, 1863, the President was authorized to make a draft for the re-enforcement of the armies of the United States in the field. The President put the law into operation. In New York City and Boston armed mobs resisted its enforcement. In Boston the mobs were too powerful for the available Federal forces to suppress. At the provost-marshall's request (with the approbation of General Wool, the commander of the United States forces in that department) the governor of Massachusetts ordered out the State militia to assist the Federal forces in suppressing these mobs. The claim of the State is for expenses incurred solely in paying the State members of the militia their per diem for the time while they were so engaged. The whole amount of the claim is \$27,224.44.

By act of the 27th of July, 1861 (12 Stat., 276), it was provided that—

"The Secretary of the Treasury be, and he is hereby directed * * * to pay to the governor of any State * * *

Claim of the State of Massachusetts.

the costs, charges, and expenses properly incurred by such State for enrolling * * * its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

By act of March 8, 1862 (12 Stat. 615), it was provided that the foregoing act should "be construed to apply to expenses incurred as well after as before the day of the approval thereof."

Section 16 of the act of March 3, 1863 (12 Stat. 734), which was the act giving the President power to enforce a draft, provides that—

"All expenses connected with the enrollment and draft, including subsistence while at the rendezvous, shall be paid from the appropriation for enrolling and drafting under such regulations as the President of the United States shall prescribe; and all expenses connected with the arrest and return of deserters to their regiments, or such other duties as the provost-marshall shall be called upon to perform, shall be paid from the appropriation for arresting deserters, under such regulations as the President of the United States shall prescribe."

Section 25 of the same act provides: "That if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft or in the performance of any service in relation thereto; or shall counsel any drafted men not to appear at the place of rendezvous, or wrongfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost-marshall" and upon conviction punished as therein provided.

Paragraph 21 of the regulations of the War Department under this act, approved by the President, after quoting the foregoing section 25, proceeds as follows:

"Provost marshals are required to execute this duty with firmness, but with prudence and good judgment and without unnecessary harshness."

Claim of the State of Massachusetts.

Paragraph 25 of the same regulations provides that "to enable provost-marshals to discharge their duties efficiently, they are authorized to call upon the nearest available military force, or on citizens as *posse comitatus*, or on United States marshals and deputy marshals; and these and all other persons are hereby enjoined to aid the provost-marshall in the execution of his lawful duties when called on so to do."

Paragraph 114 provides that "expenditures must be confined to items stated in these regulations. In an unforeseen emergency, requiring a deviation from this rule, a full explanation must be appended to the voucher for the expenditure."

In the enumeration of proper expenses under the act, contained in paragraph 115 of the regulation, is: "9. Such other necessary expenses, not herein provided for, as may be deemed necessary to the efficient execution of the duties of provost-marshall, subject to the decision of the provost-marshall-general."

Paragraph 13 provides that "all questions relating to the payment of expenses connected with the enrollment and draft, the arrest and return of deserters to their regiments, or such other duties as the provost-marshall shall be called upon to perform, shall be referred to the provost-marshall general, whose decision theron shall, so far as the War Department is concerned, be final."

The claim was first presented in 1884. At that time the office of Provost-Marshall-General had long been abolished. The claim was approved, however, by the proper officers of the War Department, and transmitted to the Third Auditor under clause third of section 277, Rev. Stat. In 1885 the Third Auditor reported this as a proper claim, but recommended the allowance of only that part of it which was verified by the original vouchers, and the suspension of the remainder until original vouchers could be furnished in lieu of certified copies. This was concurred in by the then Comptroller. In 1886 the new Third Auditor (Williams) made a report adverse to the whole claim, on the ground that its payment was not authorized by law, and this was concurred in by Comptroller Maynard.

I think there can be no doubt that the expenses of putting down mobs, organized by the enemies of the Government for

Claim of the State of Massachusetts.

the purpose of resisting the execution of the laws of the United States for the enrollment of troops and the re-enforcement of its armies, were expenses connected with the enrollment and draft provided by the act of March 3, 1863. Such mobs were violating the peace of the United States, within the definition of that term laid down by Mr. Justice Bradley in *Ex parte Siebold* (100 U. S. R.) and Mr. Justice Miller in *Cunningham v. Neagle* at the present term. It became the duty of the provost-marshall in the execution of the draft laws to keep the peace of the United States, and to put down the resistance to those laws, which was a breach of it. By virtue of the regulation of the President quoted above, paragraph 25, the provost-marshall was authorized to call upon the militia of the State of Massachusetts as a *posse comitatus* to assist in keeping the peace of the United States in enforcing its laws. It would seem clear that the provost-marshall had authority to incur, on behalf of the United States, an obligation to pay what the services of the persons making up the *posse comitatus* were reasonably worth. No reason is apparent why a State, which pays the troops to make up the *posse comitatus* for services rendered by them as such, should not be as fully entitled to reimbursement as the troops themselves would have been had they acted directly on the call of the provost-marshall. Such expenses were manifestly "necessary for the efficient execution of the duties of the provost-marshall" within clause 9, paragraph 115, of the regulations. They have been approved by the officers of the War Department who, since the abolishment of the office of Provost-Marshall-General, perform similar duties. Like other expenses incurred in the War Department, they go properly to the Third Auditor for examination and adjustment under section 277, Rev. Stat.

This conclusion is based only on provisions of the act of March 3, 1863; but in the act of July 27, 1861, as modified by the act of March 8, 1862, is also found legislative authority for the payment of the claim. The act provides for the reimbursement to the State of "charges and expenses properly incurred by such State for enrolling * * * its troops employed in aiding to suppress the present insurrection against

Claim of the State of Massachusetts.

the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

As has been said, the suppression of the draft riots was a necessary expense in enrolling the troops drafted under that act. It may be argued that the words "its troops," used in the act, indicate that it was only meant to apply to expenses incurred in enrolling troops under the State's authority, and not troops enrolled under the authority of the United States. The history of the Federal army organization, however, shows that the troops enrolled under the draft occupied exactly the same relation to the States as those who had been organized through voluntary enlistment by the governors of the States on the call of the President. They went to make up the quota of the State from which they were drafted. They were incorporated in the same companies and regiments with men who had voluntarily enlisted, and were always regarded as troops of their State in the service of the United States. Independently of the supplemental act of March 8, 1862, the present claim would probably not be within the provisions of the act of July 27, 1861. The supplemental act, however, makes it applicable to all expenses of enrollment thereafter as well as theretofore incurred, and thus covers the claim in question.

In my opinion, therefore, the questions propounded by the Second Comptroller of the Treasury should be answered, each of them, in the affirmative.

The papers transmitted with your letter are herewith returned.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

Coverings of Imported Merchandise.

COVERINGS OF IMPORTED MERCHANDISE.

Where philosophical instruments were imported in boxes about 8 inches square, made of hard wood, stained and finely finished, each box having a sliding lid and a metal handle, and being of dimensions sufficient to hold one instrument: *Advised* that these boxes were intended to follow their contents into consumption, and to be used therewith both as a protection to them and as furnishing a convenient means of carrying them about, and therefore that they were "designed for use otherwise than in the bona fide transportation" of their contents to the United States, and consequently are dutiable at 100 per cent. ad valorem under the proviso of the seventh section of the act of March 3, 1863, chapter 121.

DEPARTMENT OF JUSTICE,
April 21, 1890.

SIR: My opinion is asked upon the question whether the action of the collector of customs at Philadelphia is legal in assessing a duty of 100 per cent. ad valorem on certain boxes containing philosophical instruments, which the importers claim are exempt from duty under section 7 of the act of March 3, 1863. (22 Stat., 523.)

These boxes are about 8 inches square, and made of hard wood, stained and finely finished, each box having a sliding lid and a metal handle, for the purpose of convenience in carrying, and being of sufficient dimensions to hold one instrument.

Section 7 of the act of 1863 repeals sections 2907 and 2908, Revised Statutes, and section 14 of the act of June 22, 1874, and declares that "hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or coverings of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

Coverings of Imported Merchandise.

The repealed section 2907, Revised Statutes, declares that "in determining the dutiable value of merchandise there should be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the countries from whence the same has been imported into the United States * * * the value of the sack, box, or covering of any kind in which such merchandise is contained, * * * and *all other actual or usual charges for putting up, preparing, and packing for transportation or shipment.*"

And section 14 of the act of June, 1874 (18 Stat., 189), modifying somewhat the legislation contained in section 2907, Revised Statutes, in referring to the additions in the way of expenses required by the latter section to be added to the cost or market value of goods imported, mentions the "cost of packages, boxes, or other articles containing such goods, wares, and merchandise, or *any incidental expenses attending the packing, shipping, or exportation thereof from the country or place where purchased or manufactured.*" * * *

Common experience tells us that the necessary tendency of this legislation, requiring all the actual and usual charges "for putting up, preparing, and packing for transportation or shipment" to be added to the cost or value of merchandise imported into this country, was to reduce as much as possible the cost of sacks, boxes, and coverings of all kinds used for the protection of merchandise on which an ad valorem duty was laid. As the expenses of preparing the merchandise for transportation were reduced, so was the amount reduced on which the duty would be assessed.

When, therefore, Congress provided by section 7 of the act of 1883 (*supra*) that the "value of the *usual and necessary* sacks, crates, boxes, or covering of any kind" * * * should no longer be estimated as part of the value of goods imported, it would seem to have referred to the kinds of sacks, crates, boxes, and coverings which up to that time had been "*usual and necessary;*" and this seems to be placed beyond doubt by the proviso of the section, which says that "if any packages, sacks, crates, boxes, or coverings of any kind shall be of *any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide*

Coverings of Imported Merchandise.

transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

I find myself unable to hold that the boxes described in your communication are such boxes as were in contemplation by Congress when it declared that "the value of the sack, box, or covering of any kind" in which merchandise is contained shall be free from duty where it is one of the "actual or usual charges for *putting up, preparing, and packing*" such merchandise for transportation or shipment. It appears safe to say that when such charges formed part of the dutiable value of merchandise imported, it could hardly have been usual to import philosophical instruments in the expensive sort of boxes to which you refer.

To my mind it is clear that these boxes were intended to follow their contents into consumption, and to be constantly used in immediate connection with those contents, both as a protection to them and as furnishing a more convenient way of carrying them about, and therefore that they were "*designed for use otherwise than in the bona fide transportation*" of their contents to the United States, and were, consequently, dutiable at 100 per cent. ad valorem under the proviso of the seventh section.

Upon the same ground Mr. Attorney-General Garland held, in an opinion dated November 17, 1886, that the boxes in which parlor and safety matches were imported were liable to duty, because the surface on each box, for the purpose of producing ignition of the match, showed a design that the box should be used otherwise than for the bona fide transportation of its contents. And the Attorney-General refused to follow the case of *United States v. Thur er* (28 Fed. Rep., 56), where it was laid down to the jury that the same kind of match-boxes were not dutiable unless they found from the evidence that the boxes were intended to subserve "*a substantial, material, and valuable use;*" thus, as the Attorney-General remarks, giving the statute a sense its language does not warrant, by putting a restriction on the sense of the word "*use.*"

In *Rosenstein v. Magone* (34 Fed. Rep., 120) the United States circuit court for the southern district of New York held, but apparently contrary to its own convictions, that

Union River Logging Railroad Company.

match-boxes of the kind mentioned were exempt from duty under what, it seems to me, was a mistaken view of *Obersteuffer v. Robertson* (116 U. S. R., 499); for when the language of the Supreme Court is applied to the facts of that case, where there was no pretense that the boxes or coverings in question could have been designed for any other purpose than the bona fide transportation of their contents, it is quite evident that the case does not bear the construction placed on it by the learned circuit judge. No question arose in that case as to any ulterior use of the boxes or coverings in controversy, and I can not see that the mind of the court was directed to any such question.

But, however it may be with reference to match-boxes of the sorts mentioned, it seems clear to my mind that such things as boxes or cases for philosophical instruments, made of expensive woods, with useful or ornamental mountings, were not intended to be free of duty.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

UNION RIVER LOGGING RAILROAD COMPANY.

Upon the statement of facts submitted respecting the use by the Union River Logging Railroad Company (a corporation formed under the laws of Washington Territory) of Government timber standing along the line of its road: *Advised* that such use of the timber was wholly unauthorized, and that proper steps should be taken to secure indemnity to the Government, and to bring to justice the individuals who have been concerned in violating the law for the protection of its property.

The grant made by the act of March 3, 1875, chapter 152, of a right of way through the public lands, with the necessary land for stations, etc., was meant for railroad companies intending to operate roads as common carriers for the benefit and convenience of the public, and not for the benefit of the companies solely.

Where a railroad made application to the Secretary of the Interior with a view to securing the benefit of the said act of 1875, and its articles of incorporation and map of definite location were approved by the Secretary, but it afterwards appeared that the action of the Secretary was based upon a mistake of fact caused by the representation of the railroad company itself, and that the application was for a purpose

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not within the statute: *Held* that it is competent to the Secretary to recall and annul his action approving the line of definite location of the road and entering the same on the public plats.

DEPARTMENT OF JUSTICE,

May 4, 1890.

SIR: I have duly considered your communication of the 30th March, 1889, asking an opinion on the following questions:

(1) Whether judicial proceedings should not be taken by the United States against the Union River Logging Railroad Company, to obtain indemnity for timber depredations committed by that company, and also against certain persons who are or have been officers of said company to punish them for violations of the law for the protection of Government timber.

(2) Whether the action of the Department of the Interior approving the line of definite location of the said company and entering the same on the public plats under section 4 of the act of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" (18 Stat., 482) should not be set aside, and, if so, whether that can be done by the Department itself on the state of facts set forth in your communication, or whether a judicial proceeding would be more appropriate for the purpose of having it adjudged that the public lands through which the company's line of definite location passes are not subject to the right of way and other privileges and easements granted by the act of March 3, 1875.

As I am not at liberty, under the law, which requires the Attorney-General to give his opinion "upon questions of law" (Rev. Stat. §§ 354 to 357, inclusive), to make a finding of facts, I lay aside the evidence submitted for my consideration, and take as the case for opinion the statements contained in your communication.

In 1883 a corporation styled the Union River Logging Company was formed under the laws of Washington Territory, for the purpose "of building, equipping, running, maintaining, and operating a railroad for the transportation of saw-logs, piles, and other timber, and wood and lumber, and to charge

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and receive compensation and tolls therefor, the line of said road being intended to run from a point on tide water in Lynch's Cove, at the head of Hood's Canal, in Mason County, and running thence in a general northeasterly direction a distance of about 10 miles to a point at or near the northeast corner of township 24 north, range 1 west, Willamette meridian."

"On the 17th of August, 1888, the railroad company filed "supplemental articles of incorporation" in the office of the secretary of the Territory, in conformity to law, providing for "a line of road from a convenient point on tide water, in Lynch's Cove, at the head of Hood's Canal, in Mason County, and running thence in a general northeasterly direction to a convenient point on tide water in Dyes' Inlet, in the county of Kitsap, in said Territory; and also a branch from said line at some convenient point thereon between Lynch's Cove and Dyes' Inlet, and running thence in a general northerly direction to or near the town of Seaback, on Hood's Canal, in the said county of Kitsap; and also a branch from some convenient point on the line of said road between said Lynch's Cove and Dyes' Inlet, and running in a general northeasterly direction to tide water at or near Port Orchard, in the county of Kitsap."

The supplemental articles declared that the object of the company was "to maintain and operate said railroad and branch to carry freight and passengers and to receive tolls therefor, and also to engage in and carry on the general logging business, and provide for the cutting, hauling, transportation, buying, owning, acquiring, and selling all kinds of logs, spars, piles, lumber, and timber, as provided for in the original articles of incorporation."

After the filing of these supplemental articles, to wit, in January, 1889, the railroad made application in due form to the Department of the Interior, with a view of securing the benefits of the act of March 3, 1875, and on the 29th of January, 1889, "the articles of incorporation and maps of definite location of said Union River Logging Railroad Company were approved by the Department as being in conformity with the act."

Between 1883, the year of its incorporation, and the pres-

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ent time the company has constructed only 5 miles of road, and it not only has used Government timber standing along the line of the road for the purposes of construction, but it has taken and appropriated that timber for other purposes.

There can be no doubt that this use of the timber was wholly unauthorized, and that proper steps should be taken both to secure indemnity to the Government and to bring to justice the individuals who have been concerned in violations of the law for the protection of this valuable property, and when requested I shall promptly give the necessary instructions to begin the proper proceedings for the attainment of those objects.

This disposes of the first question.

The second question requires more consideration.

While the charter of the railroad company, particularly as amended, describes a corporation intended to exercise the public calling of a common carrier of passengers and freight as well as to carry on the logging business, as provided for in the original articles of incorporation, the fact is that the company is and has been exclusively occupied in the logging business, and that all the carrying it does or has been doing is for itself alone and the promotion of its own private business; and it further appears that owing to the absence of population in the region where the road is located it is impossible for the company to do the business of a common carrier, because there is as yet no public there to furnish such business.

There is no room for doubt, I think, that the privileges granted by the act of March 3, 1875, to any railroad company, duly organized under State, Territorial, or Federal authority, of a right of way of 200 feet in width through the public lands, with the necessary lands for stations, shops, etc., together with the right to take earth, stone, timber, and other material from the public lands adjacent to the line of the road of such company, were meant to be extended by Congress to railroad companies intending to operate roads for the benefit and convenience of the public as common carriers, and not for their own benefit, except in so far as that benefit represented a return for their public services. This view is placed beyond doubt by the third section of the

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act of 1875, which gives the Territorial legislatures power to provide for the condemnation of "private lands and possessory claims on the public lands of the United States" for the benefit of the railroad companies entitled to claim the privileges of the act; and it is almost needless to add that Congress can not be presumed to have had it in contemplation in this statute to authorize the right of eminent domain to be used for the benefit of a merely private or trading corporation. This makes it quite unnecessary to inquire whether Congress could authorize the use of the power of eminent domain in any such case.

It is unnecessary to consider whether the benefits of the act of 1875 are open to a railroad company that proposes to be at once a common carrier and a private business corporation, because it is to be taken by me as a fact, that, at the time of its application to the Department of the Interior, the Union River Logging Company had no other intention than that of operating its railroad for the purposes of its own private business, as it had been doing previous to its application.

There can be no doubt that, for the benefit of settlers as well as its own, the Government has the right to have an authoritative declaration made that the public lands through which the line of the railroad in question runs are not subject to the burdens imposed by the act of 1875; and this brings me to the consideration of the question whether the Department of the Interior has the power to make such a declaration and so to annul or recall its action approving the line of definite location of the railroad and noting the same on the plats of the Land Office in supposed conformity to the fourth section of the act of 1875.

It is manifest that the action of the Department was upon a mistake of fact, caused by the deliberate representation of the railroad company itself, that it intended to engage in the business of a common carrier in reality, and not on paper merely; whereas, as subsequent inquiry has shown, the company not only did not but could not have reasonably had any such intention.

It follows, then, that the application to the Department was for a purpose not authorized by law, and that the action

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taken in granting the application was void, it being perfectly clear that no disposition can be made of any part of the public domain without the authority of Congress.

The effect of the action of the Department has been to raise a cloud upon the Government's title to the lands through which the line of the railroad runs, and thus to interfere seriously, so long as that action remains in force, with the Department's administration of so much of the public domain by practically withdrawing the same from entry.

To hold that the Department can not in this case cancel its approval and erase the line of the railroad from the public plats, but that the United States must go into a court of equity for that purpose, would seem to urge the conclusiveness of executive action to an unreasonable extent.

The principle of *res judicata*, while to some extent applicable to the action of executive officers, has never been held to prevent an officer from reopening a matter on which he had acted on a mistake of fact, or where new and additional evidence, which would justify a new trial or a rehearing, has been adduced.

If this were a case where a patent, though void, had been issued, it must be admitted that the Department would have no power to remove any resulting cloud or difficulty by compelling the surrender and cancellation of the illegal patent, but would be required to resort to equity; whereas in the case before me it is entirely practicable for the Department to remove the line of the railroad from the public plats, both here and in the local land office, and thus effectually cancel the approval improvidently given. It is not necessary, in order to undo what has been done, to compel the company to surrender any paper for cancellation, because it is the public plats alone that need to be changed, and these are under the entire control of the Department of the Interior.

It is true that in the supposed case of the void patent the Department might afterwards issue a valid patent for the same land, but that would be inexpedient, as it would leave the void patent outstanding as a menace to the valid one, exercising a depressing effect on the value of the land involved. Still Mr. Attorney-General Wirt held that where a patent is issued to an assignor, instead of his assignee, and the former

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refuses to surrender the patent, another patent may issue, correcting the mistake and containing a proper recital to show why it was issued. (2 Opin., 41.)

It would seem to be a useless circuity to have recourse to judicial proceedings to correct executive action in a case like the one in hand, where there is a concurrence of mistake of fact and want of power in the Department, and where the void proceeding is an obstacle in the way of the Land Office.

Mr. Attorney-General Cushing seems to lay down the same doctrine, when, in declaring the principle of *res judicata* to be applicable to executive action, and stating the limitations of that doctrine, he says that "when a thing is decided and done by the head of a Department *acting within the scope of his lawful authority*, it can be revised by his successor only on the ground of *mistake in a matter of fact, or the discovery and production of material new testimony.*" (7 Opin., 701.) The same doctrine is laid down by the Supreme Court in *United States v. Bank of the Metropolis*. (15 Pet., 377, 401.)

In a word, my opinion is that the Union River Logging Company and its officers are responsible as depredators and trespassers on Government land; that the company is not entitled to enjoy the benefits of the act of March 3, 1875; and that it is within the competency of the Department of the Interior to recall and annul its action approving the line of definite location of the railroad company and entering the same on the public plats.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

CIVIL SERVICE—CERTIFICATE FOR REINSTATEMENT.

H. served in the war of the rebellion, in a New York regiment, from May 12, 1861, to May 13, 1863, when he was honorably discharged. On the latter date he enlisted in the "general service" of the Army, for clerical duty at Headquarters, and was transferred to the Adjutant-General's office April 1, 1864, in which he served on clerical duty until May 13, 1868, when he was discharged through no delinquency or misconduct on his part. Application being now made by him for reinstatement under amended Departmental Rule X of the Civil-Service Regulations, the Secretary of War requests that he be certified by the Civil

CIVIL SERVICE—CERTIFICATE FOR REINSTATEMENT.

Service Commission for reinstatement as a clerk in the War Department under said rule: *Held* that H., during the period of his enlistment in the "general service" for clerical duty, as above, was not in the classified departmental service, and that (he not having been separated from the latter service) his case does not come within the provisions of said Rule X, and therefore that he can not be certified thereunder.

DEPARTMENT OF JUSTICE,
May 9, 1890.

SIR: Your communication of March 12, 1890, submits for consideration and opinion the following case:

On February 25, 1890, the Secretary of War addressed a communication to the United States Civil Service Commission, stating that John A. Hayward had made an application for reinstatement as a clerk in the War Department under amended Departmental Rule X, Civil-Service Rules:

"Hayward was enlisted in the general service for clerical duty at the Headquarters of the Army, May 13, 1863, and was transferred to the Adjutant-General's office April 1, 1864, in which office he served until May 13, 1868, when he was discharged through no delinquency or misconduct on his part."

"During the time mentioned the clerical force of the Department was largely composed of what were known as general-service clerks, who were duly authorized and enlisted expressly for clerical duty in the War Department and its bureaus, and were afterwards, by the legislative, executive, and judicial appropriation act of August 5, 1882, transferred to the regular list.

"The records show that Mr. Hayward served in the war of the rebellion in Company B, Twenty-first New York Volunteers, from May 12, 1861, to May 13, 1863, when he was honorably discharged."

In view of these facts the Secretary of War requested that Hayward's name be certified for reinstatement to a clerkship in the War Department of class \$1,000, a vacancy in which grade now exists.

The Civil Service Commission being in doubt as to whether Hayward came under amended Departmental Rule X, Civil-Service Rules, asked that the question be referred to the Attorney-General for an opinion.

CIVIL SERVICE—Certificate for Reinstatement.

The amended Departmental Rule X is in the following words:

“Upon requisition of the head of a Department, the Commission shall certify for reinstatement in said Department, in a grade requiring no higher examination than the one in which he was formerly employed, any person who, within one year next preceding the date of the requisition, has, through no delinquency or misconduct, been separated from the classified service of that Department: *Provided*, That certification may be made, subject to the other conditions of this rule, for the reinstatement of any person who served in the military or naval service of the United States in the late war of the rebellion and was honorably discharged therefrom, without regard to the length of time he has been separated from the service.”

It will be observed that the reinstatement contemplated by this rule is, first, that of any person who once belonged “*to the classified service*” of a Department, and who has been separated from that classified service “through no delinquency or misconduct,” and for whose reinstatement an application has been made within one year next preceding the date of such application; and, secondly, that of any person who has served honorably in the war of the rebellion and been honorably discharged, “without regard to the length of time he has been *separated from the service*,” if otherwise qualified under the rule. In either case the applicant may be reinstated in such Department “in a grade requiring no higher examination than the one in which he was formerly employed.”

By section 3 of the act of March 3, 1853 (10 Stat., 209), it was declared that after June 30, 1853 “the clerks in the Departments of the Treasury, War, Navy, the Interior, and the Post-Office, shall be arranged into four classes, of which class number one shall receive an annual salary of nine hundred dollars each, class number two an annual salary of one thousand two hundred dollars each, class number three an annual salary of one thousand five hundred dollars each, and class number four an annual salary of one thousand eight hundred dollars each,” and it was further declared by this law (p. 211) that “no clerk shall be appointed in either of the four classes until after he has been examined and found

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qualified by a board, to consist of three examiners," etc., and by section 4 of the act of March 3, 1855 (10 Stat., 669), the above provisions were applied to the Department of State. This legislation now constitutes sections 163 and 164 of the Revised Statutes.

This was the state of the law on May 13, 1868, when Hayward was "*discharged*" from the War Department.

I do not think it can be said with any propriety that Hayward, whose *status* was that of an enlisted soldier, belonged to any "grade" of the "classified departmental service," which was then composed of "clerks in the Departments" (Rev. Stat., 163), and was purely *civil* in character. It could only be entered after a successful examination (Rev. Stat., 164); but it does not appear that Hayward was subjected to an examination before he was detailed for duty in the War Department, although it appears that he was enlisted for clerical duty only.

Hayward being then a military person and receiving the pay of an enlisted soldier, and therefore not being a member of the "classified service," I am not able to see how he can be brought within the amended Departmental Rule X, which provides only for the reinstatement in the classified service of a Department of a person who has, from no fault of his own, *been separated from that service*. Having never belonged to the classified departmental service, it is impossible for Hayward to be reinstated in that service.

This view seems to be fully supported by the act of August 5, 1882 (22 Stat., 242), which substituted for the "general service," or "detailed enlisted men from the Army" doing duty in the various offices and bureaus of the War Department, clerks in the classified service, and authorized the Secretary of War to put the enlisted men so employed into the classified service, which plainly shows that Congress did not understand that enlisted men detailed as clerks belonged to the classified service.

It results, therefore, from the foregoing that Hayward can not be certified under amended Departmental Rule X, as requested by the Secretary of War.

Very respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

Bond.

BOND.

The question whether a bond taken by the collector of a port from one of his subordinates, for his own protection, is valid in the absence of a statute authorizing it, not appearing to be a question in which the United States are concerned or one arising in the administration of a Department, the Attorney General declines to give an official opinion thereon.

DEPARTMENT OF JUSTICE,*May 12, 1890.*

SIR: Your communication of April 18 ultimo, and the inclosures therein referred to, present the question whether bonds taken by the collector of customs of the port of New York from certain of his subordinates, for his own protection, are valid, in the absence of some law authorizing him to require such security.

This question is understood to have been submitted at the instance of the collector, and appears to me to be one in which he, and not the United States, is interested. The collector himself having given the United States the security required by law, it can not be said that the latter has any legal interest in the bare question whether the bonds referred to are valid or not. That being the case, it would seem that the question submitted is not a question of law arising in the administration of the Treasury Department, and therefore that it is not such a question of law as falls within section 356 of the Revised Statutes of the United States, which provides that "The head of any Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department."

As was said by Mr. Attorney-General Cushing, "In repeated instances it has been decided by my predecessors in office that the Attorney-General of the United States has no right to give an official opinion except in those cases in which it is required of him by law" (6 Opin., 25); and as another of my predecessors has said, "the Attorney-General has no warrant to act outside of the statutes which define his office." (15 Opin., 139.)

Rendition of Accounts.

But for this limitation on my power it would afford me pleasure to comply with your request.

Very respectfully, your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

RENDITION OF ACCOUNTS.

The first clause of section 3622, Revised Statutes, which requires the rendition of accounts monthly, is applicable to every officer who receives advances of public money to be disbursed, and also to every officer who collects and receives fees and revenues which it is his duty to account for.

The requirement that officers render their accounts monthly is not subject to the direction of the Secretary of the Treasury, excepting in extraordinary cases, where he shall be of opinion that the statutory period ought to be enlarged to meet the special circumstances of such cases. Opinion of Attorney-General Devens of December 2, 1878 (16 Opin., 222), concurred in.

DEPARTMENT OF JUSTICE,
May 12, 1890.

SIR: Your communication of January 27, 1890, submits for opinion three questions which have arisen in the Treasury Department upon section 3622, Revised Statutes, which section is in the following language:

"Every officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument, shall render his accounts monthly. Such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail, or otherwise, to the bureau to which they pertain, within ten days after the expiration of each successive month, and, after examination there, shall be passed to the proper accounting officer of the Treasury for settlement. Disbursing officers of the Navy shall, however, render their accounts and vouchers direct to the proper accounting officer of the Treasury. In case of the non-receipt at the Treasury or proper bureau of any accounts within a reasonable and proper time thereafter, the officer whose accounts are in default shall be required to furnish satisfactory evidence of having complied with the

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provisions of this section. The Secretary of the Treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinbefore prescribed for the rendition of accounts. Nothing herein contained shall, however, be construed to restrain the heads of any of the Departments from requiring such other returns or reports from the office or agent, subject to the control of such heads of Departments, as the public interest may require."

The first question is in these words: "The first clause of the statute is as follows: 'Every officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument, shall render his accounts monthly.' Does this clause require the rendition of monthly accounts by every officer or agent who receives advances of public money from the Treasury, to be disbursed under appropriations made by Congress, and also by every officer or agent who collects and receives fees and revenues which he is by law required to account for and pay into the Treasury?"

This question I answer in the affirmative. I can see no reason why effect should not be given to the words of the statute according to their ordinary sense.

The next question is: "Does the clause in the statute which provides that the Secretary of the Treasury may extend the time prescribed for the rendition of accounts confer upon the Secretary authority to grant permission to any officer or agent coming within the provisions of the act to render his accounts for a longer period than a month (for example, to render quarterly instead of monthly accounts); or does said clause relate to extending the limit of ten days within which the officer or agent is required to transmit his accounts with the vouchers to the proper bureau or Department, after the expiration of each successive month?"

The same question was passed upon by Attorney-General Devens in his opinion of December 2, 1878 (16 Opin., 222). He said that the law requiring disbursing officers to render their accounts monthly was not subject to the discretion of the Secretary of the Treasury, except in extraordinary cases, as provided, where the Secretary of the Treasury should be of opinion that the statutory period of a month should be en-

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larged to meet the special circumstances of such cases; such powers of the Secretary being intended to be exceptional in character, and not to authorize him "to institute a new system of rendering accounts." I concur in that view and in the reasoning by which it is supported.

The next question is: "If the Secretary of the Treasury may lawfully authorize any officer or agent within the provisions of the statute to render his accounts for a longer period than a month (as by rendering them quarterly instead of monthly), is such authority limited to individual and exceptional cases, or may it be extended indefinitely to classes of accounts, so as to establish a system of rendering accounts continuously for longer periods than a month?"

My answer to the second question, taken in connection with the opinion of Attorney-General Devens, also disposes of this question.

I have the honor to be, very respectfully, yours,
W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

INDIAN ALLOTTEES UNDER THE ACT OF 1887.

An Indian allottee under the act of February 8, 1887, chapter 119, may remove and sell *dead* timber, standing or fallen, from his allotment. Such allottee can not lawfully lease or rent the whole or any part of his allotment, either with or without the approval of the Secretary of the Interior.

Nor can he lawfully impart to a third person, by contract, the right to erect upon his allotment mills for the manufacture of lumber or other products.

DEPARTMENT OF JUSTICE,
May 21, 1890.

SIR: Your communication of March 24, 1890, requests an opinion as to the power of an Indian allottee, under the act of Congress of February 8, 1887 (24 Stat., 388), to sell and remove dead timber, standing or fallen, on the land allotted to him; to lease or rent, with or without the consent of the Secretary of the Interior, the whole or any part of his allotment; and to contract for or permit the erection of mills for the manufacture of lumber, or other purposes, upon his allot-

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ment. It is also asked, what use may an allottee make of his allotment, otherwise than by occupancy and cultivation, so as to make the same contribute to his support?

Before proceeding to answer the several questions submitted it will be necessary to understand precisely what relation the allottee holds to his allotment under the act of February 8, 1887 (*supra*).

That act provides (sec. 1) that the President of the United States may allot to any Indian of a tribe or band located on a reservation containing land "advantageous for agricultural and grazing purposes" a definite amount of land, and prescribes (secs. 2 and 3) the quantity of land to be allotted and how the allotment shall be made.

Section 4 provides for the allotment of land to any Indian, not residing on a reservation, or for whose tribe no reservation has been provided, and who has made settlement upon any surveyed or unsurveyed lands of the United States, not otherwise appropriated.

Section 5 provides that "upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare, that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." The act then goes on to declare that "the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto' after the execu-

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tion and delivery of the patent, except that the law of descent and partition of the State of Kansas shall apply to allotments of land in the Indian Territory. It is unnecessary to refer particularly to the rest of this section.

Section 6 provides that the allottees shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and that no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. It then provides that "every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

This act together with the preceding acts of March 3, 1875 (18 Stat., 420), January 18, 1881 (21 Stat., 315), and July 4, 1884 (23 Stat., 96), mark, as was observed by Acting Attorney-General Jenks in his opinion of July 27, 1888, "a new epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore. It is dismemberment of the tribes or bands, and absorption, as citizens, of the individuals composing them by the States and Territories containing the lands on which such individuals settle or may be settled, that is the policy of this new legislation.

"But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy. The legislation above mentioned deprives the Indian settler of the right of conveying or incumbering the land, in any way, for a period stated, or provides that it shall be held by the United States for a given time in trust for the sole use and benefit of the Indian, and, at the expiration of such time, be conveyed to him by patent."

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The opinion then goes on to show that Congress has the power and is under a high duty to continue its guardian care over the individual Indian after he has assumed the relation of citizen of a State or Territory, and until he has been "educated to understand the dignity and responsibilities that belong to citizenship and the ownership of property," and that "it is to protect him while receiving this education that Congress placed the above-mentioned restraints upon his property rights."

The patent to be first issued to the Indian allottee, under section 5 of the act of 1887, is not intended to convey to him the title of the United States, but is in the nature of a declaration of a trust in the land or a covenant to stand seized of it to the use of the allottee and his heirs until the time shall have arrived when it shall be deemed proper to put an end to the trust by vesting the legal title in him or his heirs.

The effect of the allotment and declaration of trust are to place the allottee in possession of the land allotted and give him a qualified ownership therein, and the extent to which the allottee is thus restricted as a proprietor remains now to be considered, in so far as necessary to answer the questions submitted.

(1) And first as to timber: In an opinion of Attorney-General Garland dated January 26, 1889, it was held to be waste for an allottee to cut timber standing on his allotment for the direct purpose of selling it, by which I understand him to mean timber that is live and growing. The question before me, however, namely, whether the allottee has the right to sell and remove from his allotment *dead* timber, standing or fallen, is essentially different from that passed upon by my predecessor, and as I have reached the conclusion that appropriating and selling dead timber of any kind is not waste at common law or by the law of Wisconsin, within the limits of which State the timber in question is situated, it is not necessary to reëxamine the question whether an allottee is impeachable for waste.

Lord Coke tells us that the cutting of dead wood, which he defines as trees that are dried up, dead, or hollow, not being timber or bearing fruit or leaves in summer, is no waste (Co. Litt., 53a, 53b). Indeed, this would seem to fol-

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low from the well known principle that to constitute waste some permanent injury must be done to the inheritance by the tenant of a particular estate, as, for example, a tenant for life or years, it being quite evident that the removal of dead wood, particularly when standing and threatening the safety of trees near it and valuable for timber, seems more like a benefit than an injury of any kind.

It would be entirely out of harmony with the more liberal American doctrine of waste, as applicable to timber, to hold that a tenant who is, by that doctrine, in many cases entitled to fell timber for the express purpose of opening the land to cultivation, is still not at liberty to use the dead wood on the land in addition to the estovers allowed him by law. The law on this subject will be found presented in the case of *Wilkinson v. Wilkinson* (59 Wis., 561), *Shine v. Wilcox* (1 Dev. & B. Eq., 631), *King v. Miller* (99 N. C., 594), *Dorsey v. Moore* (100 N. C., 44); and it appears by the decisions of the supreme court of Wisconsin that the injury called "waste" is the same in that State as at common law (*Lander v. Hall*, 69 Wis., 331, and *Handlow v. Thieme*, 53 Wis., 57), supposing that a question of waste by an Indian allottee on land in Wisconsin is to be determined by the law of that State.

This answers the first question. The remaining questions I proceed to dispose of in their order.

(2) Can an allottee under said act lawfully lease or rent, either with or without the approval of the Secretary of the Interior, the whole or any part of his allotment?

This question I answer in the negative. The act declares that any conveyance of the allotment or contract touching the "same," that is, the allotment, made before the expiration of the probationary term, shall be "absolutely null and void."

(3) If not, can he lawfully contract for, or permit, the erection of mills for manufacture of lumber, or other purposes, upon his allotment?

I can not see how it is possible that any valid contract, giving a third person the right to use, for any such purpose, the land allotted, can be made, beyond a mere revocable license. The allottee can not incumber his land in any way during the term he is learning to adjust himself to his new relations

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in life. To allow him to do so would in many instances entirely defeat the object of the law.

(4) What use may an allottee lawfully make of his allotment, other than individual occupancy or cultivation, by which the property can be made to contribute to his support?

This question is purely abstract and hypothetical, and does not arise out of an actual case calling for official action. It is, therefore, beyond my competency to give an opinion on such a question under section 356, Revised Statutes. See also 11 Opin., 189.

I have the honor to be yours, very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

RESERVATION OF LANDS FOR IRRIGATION PURPOSES.

The provision in the act of October 2, 1888, chapter 1069, reserving from sale or entry lands designated or selected for reservoirs, ditches, or canals for irrigation purposes, and also lands made susceptible of irrigation by such reservoirs, ditches, or canals, operates as an immediate withdrawal of the lands thus described from entry and settlement.

DEPARTMENT OF JUSTICE, May 24, 1890.

SIR: By a letter of April 21, 1890, you submitted for the consideration of the Attorney-General a letter from the Commissioner of the General Land Office, raising the question: "Whether, under the act of October 2, 1888 (25 Stat., 526), the reservation extends to such tracts as may be actually selected as sites, etc.—becoming operative only after such selection—or whether the reservation from disposal extends from the date of the act to the entire expanse of the arid region, as more particularly defined in the communication?"

Since your letter of April 21 you have transmitted also the opinion of Mr. Assistant Attorney-General Shields, assigned to your Department, to whom you referred the question. After an examination of the law and of the considerations presented by Mr. Shields in his opinion, I have to say that I fully concur with him in his conclusions and the grounds stated therefor, and that, in view of the lucid opin-

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ion which he has rendered, it is unnecessary for me to give extended reasons for such concurrence.

The section of the law which presents the question of construction referred by you to this Department is found in the sundry civil appropriation act of 1888, under the appropriations for the United States Geological Survey. The subject is introduced by an appropriation of \$100,000, or so much thereof as may be necessary, "for the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation." The Director of the Geological Survey is then required to make a report to Congress on the first Monday in December in each year, showing how the money appropriated has been expended. Then follows the particular language, which is the subject for construction :

"And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals, are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement, or occupation until further provided by law: *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws."

The object of the act is manifest. It was to prevent the entry upon, and the settlement and sale of, all that part of the arid region of the public lands of the United States which could be improved by general systems of irrigation, and all lands which might thereafter be designated or selected by the United States surveys as sites for the reservoirs, ditches, or canals in such systems. Unquestionably, it would seriously interfere with the operation and purpose of the act if the sites necessary for reservoirs in such plan of irrigation could be entered upon by homestead settlers. So,

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too, it would be obviously unjust if, pending the survey made with a view to their segregation for improvement by irrigation, these lands could be entered upon and settled as arid lands of the United States. It was, therefore, the purpose of Congress by this act to suspend all rights of entry upon any lands which would come within the improving operation of the plans of irrigation to be reported by the Director of the Geological Survey under this act. Language could hardly be stronger than are the words of the act in expressing this intention : "*All the lands which may hereafter be designated or selected,*" etc., "*are from this time henceforth hereby reserved from sale,*" etc., "*and shall not be subject after the passage of this act to entry,*" etc., "*until further provided by law.*" There can be no question that if an entry was made upon land which was thereafter designated in a United States survey as a site for a reservoir, or which was by such reservoir made susceptible of irrigation, the entry would be invalid, and the land so entered upon would remain the property of the United States, the reservation thereof dating back to the passage of this act.

The far-reaching effect of this construction can not deprive the words of the act of their ordinary and necessary meaning. The proviso that "the President may at any time in his discretion by proclamation open any portion or all of the lands" so reserved, was the legislative mode of modifying and avoiding the far-reaching effect of the act, whenever it should appear to the Executive to have too wide an operation. Entries should not be permitted, therefore, upon any part of the arid regions which might possibly come within the operation of this act.

All the papers accompanying your request, together with the opinion of Mr. Assistant Attorney-General Shields, are herewith returned.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

Retained Pay of Soldiers.

RETAINED PAY OF SOLDIERS.

The accounting officers of the Treasury should allow a paymaster of the Army credit for payment to a soldier of his retained pay under section 1281, Revised Statutes, where the latter has received an honorable discharge, although it may appear that after enlisting the soldier deserted, but was restored to duty without trial and served out the full term of his enlistment.

DEPARTMENT OF JUSTICE,
May 29, 1890.

SIR: On the 2d of May, 1890, you submitted to the Attorney-General for his opinion the question whether the accounting officers are authorized to give credit to paymasters of the Army for payments by them of the retained pay under section 1281, Revised Statutes, in cases where the record of the soldier shows that after enlistment he deserted, was apprehended, was restored to duty without trial, and served out the full term of his enlistment, receiving an honorable discharge.

The question really involved is whether the action of the War Department in giving to the enlisted man an honorable discharge, which is in fact a certificate that his service has been honest and faithful until the date of his discharge, is conclusive upon the accounting officers of the Treasury, or whether the latter officers may examine the record as presented, and then decide whether his service has been honest and faithful.

The question is not free from difficulty, but I do not find it necessary to go into a discussion of it at the present time in view of a recent decision by the Court of Claims. In the case of *Kingsley v. The United States* (24 Ct. Cls. R., 219), it is held that the retained pay given to soldiers at the time of their discharge for honest and faithful service by the Revised Statutes, section 1281, can not be forfeited in a collateral proceeding like that of the approval of accounts by the accounting officers of the Treasury. In that case the claimant had been enlisted as a private in the Marine Corps August 12, 1882, at Brooklyn, N. Y. He was discharged June 4, 1887, by order of the Secretary of the Navy as "unfit for service;

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character bad." He sued to recover pay under section 1281 and transportation and subsistence under section 1290. His record showed a list of eight offenses, for one of which he had been tried by a summary court-martial and sentenced to thirty days' solitary confinement. It was contended by the United States that this was necessarily unfaithful service. The contention was not sustained. It was held by the Court of Claims that it was necessary that the forfeiture of the retained pay should be considered and declared by the court-martial or other military authority having jurisdiction in the premises. Says Schofield, Judge, speaking of the official record of the claimant relied upon by the Government:

"Whether or not this record exhibits the honest and faithful service required by the statute is not a question to be tried in a collateral proceeding. The forfeiture, like the discharge, should be considered and declared by the court-martial or other military authorities having jurisdiction in the premises. Forfeiture not having been imposed, paymasters, accounting officers, and courts are not required to reconsider the alleged misconduct and add to the penalty prescribed by the military authorities."

It seems to me that this case is stronger than the case now presented, because there the claimant had not an honorable discharge. It is quite true that desertion is a more serious offense than those which were sought to be made a ground for withholding pay in the case cited. But that can not affect the governing principle. If the accounting officers have not the authority to decide upon the question whether the offenses named in *Kingsley v. The United States* rendered the service to the date of discharge other than honest and faithful, they certainly have not this authority in cases of desertion; the difference is only one of degree. The case of *Kingsley v. The United States* has been appealed to the Supreme Court of the United States, on the recommendation of the Secretary of the Treasury. Pending that appeal, the law must be held to be as laid down by the Court of Claims. The result is that the accounting officers should give credit to the paymasters of the Army for payments made by them of the retained pay provided by section 1281, Revised Stat-

Oklahoma—Internal Revenue.

utes, for honest and faithful service, to soldiers who have received an honorable discharge, although it appears that they deserted some time during the period of their enlistment, were restored to duty without trial, and served out the full time of their enlistment.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

OKLAHOMA—INTERNAL REVENUE.

The act of May 2, 1890, chap. 182, entitled "An act to provide a temporary government for the Territory of Oklahoma," etc., having an established organized government in that Territory, no reason now exists for making any distinction between it and any other organized territory with reference to the enforcement of the internal-revenue laws.

DEPARTMENT OF JUSTICE,
June 5, 1890.

SIR: Your letter of May 29, 1890, to the Attorney-General, inclosing a letter from the Commissioner of Internal Revenue dated May 26, 1890, with reference to the enforcement of the internal-revenue laws in the Territory of Oklahoma, was duly received. In accordance with the suggestion of the Commissioner, you request an expression of opinion from the Attorney-General as to the propriety and necessity of enforcing all the provisions of the internal-revenue laws in Oklahoma in the same manner and to the same extent as they are executed and enforced in the States and the other Territories of the Union, and to this end of issuing special-tax stamps through collectors of internal-revenue taxes, as in other parts of the country.

In reply, I have the honor to say that, in view of the fact that the Territory of Oklahoma, under the law passed by the present Congress and approved May 2, 1890, is given a complete and organized government, there is no reason now for making a distinction between it and any other organized

Employment of Troops in Enforcing the Laws.

Territory with reference to the enforcement of the internal-revenue laws. Special-tax stamps should therefore be issued, and other internal-revenue taxes collected, in Oklahoma, exactly as in other parts of the Union.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

EMPLOYMENT OF TROOPS IN ENFORCING THE LAWS.

The provision in section 15 of the act of June 18, 1878, chapter 263, forbidding the employment of the Army as a *posse comitatus* for the purpose of executing the laws, does not abridge the power to use any part of the land or naval forces, or militia, for the purposes set forth in section 1989, Revised Statutes.

DEPARTMENT OF JUSTICE,
June 6, 1890.

SIR: You have asked me whether, in my opinion, section 1989 of the Revised Statutes, which reads as follows: "It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary to aid in the execution of judicial process issued under any of the preceding provisions, or as shall be necessary to prevent the violation and enforce the due execution of the provisions of this title," is in conflict with and repealed by the section of the statute known as the *posse comitatus act*, which reads as follows: "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation

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of this section." (Supplement to the Revised Statutes, page 363, sec. 15.)

In the first place, it will be observed that section 1989 is much broader in its terms than section 15. Section 1989 provides for the employment of the land or naval forces of the United States or of the militia. Section 15 applies only to the Army. As applied to any other force than the Army, of course, there is no conflict between these sections. What constitutes the Army is defined in title 14 of the Revised Statutes.

Second. But aside entirely from this technical consideration of the question, I think it entirely clear that section 15 was not intended to and does not repeal or present a conflict with section 1989. Section 1989 was enacted as part of the civil rights bill in 1870, and section 15 was enacted in 1878. In my opinion, section 1989 is within the exception of section 15. The language of the latter section, "except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by *act of Congress*," refers as well to constitutional provisions and statutes then existing as to such as should be thereafter enacted. That such should be the construction with reference to constitutional provisions no one would question, and the reason seems equally clear for applying it to statutory provisions, and such has been the construction by this Department.

Sections 5298 and 5300 of the Revised Statutes were enacted in 1861, yet Mr. Attorney-General Devens held that they were within the exceptions named in section 15 as above; and that the President, notwithstanding the enactment of section 15, and conceding its validity, was authorized under sections 5298 and 5300 to use the Army for the enforcement of the laws (16 Opin., 162), without expressing any opinion as to the validity of section 15, known as the *posse comitatus act*. I am very clear that it does not at all abridge the power to use any part of the land or naval forces or militia for the purposes set forth in section 1989.

Respectfully, yours,

W. H. H. MILLER.

The PRESIDENT.

Land-Grant Road—Transportation of Troops.

LAND-GRANT ROAD—TRANSPORTATION OF TROOPS.

The transportation of an officer in the Corps of Engineers of the Army, while traveling in the discharge of duties connected with river and harbor improvements to which he has been assigned, comes within the provisions of the Michigan land-grant act of June 3, 1856, chapter 44, and of the act of July 3, 1866, chapter 158, supplementary thereto, requiring the transportation of troops of the United States free from toll or other charge.

DEPARTMENT OF JUSTICE,

June 9, 1890.

SIR: On the 16th of December, 1889, you inclosed to me a letter from Col. O. M. Poe, Corps of Engineers, dated December 6, with other papers, relative to Colonel Poe's transportation on official business over that portion of the Michigan Central Railway the construction of which was aided by grants of land from the United States under the act approved June 3, 1856 (11 Stat., 21), as amended and supplemented by the act of Congress of July 3, 1866 (14 Stat., 78).

Colonel Poe was and is an officer in the Corps of Engineers of the Army of the United States, and was in charge of the work of improving the harbor at Sault Ste. Marie, in Michigan, with his headquarters at Detroit. It was necessary in the discharge of the duty to which he was assigned that he should travel over the Michigan Central road between the places mentioned. He requested from the president of the railway company free transportation over that part of the company's lines constructed with the aid of the Government grants under the acts referred to. His request was refused on the ground that the provisions of the acts of Congress for free transportation did not include an officer of the Corps of Engineers of the Army, traveling on business connected with the river and harbor improvements. You now ask the opinion of the Attorney-General upon the question whether this refusal of the railway company was justifiable, and request that if this be answered in the negative the proper steps be taken to compel the company to comply with the terms of its grant.

The act of Congress approved June 3, 1856, provided by its first section that there should be granted to the State of

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Michigan, for the purpose of aiding in the construction of a railroad between the terminal points of the road now in question, every alternate section of land designated by odd numbers for six sections in width on each side of the said road.

Section 3 provided : "That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

The act of Congress approved July 3, 1866 (14 Stat., 79), which was supplementary to the act just quoted from, contained the following as a proviso :

"*Provided, further,* That the road mentioned in the first section of this act shall be and remain a public highway for the use of the Government of the United States, and shall transport free from toll and other charge all property, troops, and munitions of war belonging to the same."

The point to be considered in answering the question put is, whether the transportation of an officer of the Engineer Corps of the Army of the United States, necessary in the improvement by the Government of a river or harbor, is included within the expression of the statute, "transportation * * * of troops."

The claim is made on the part of the railway company that "transportation of troops," as used in the two sections quoted, means the transportation of troops of the United States for military purposes, and not on business connected with river and harbor improvements, which is civil business.

I can not agree with this contention. Both sections provide for the transportation of the property of the United States. There is no limitation upon the character or description of the property to be so transported. Indeed, the papers in this case show that it is conceded by the railway company that it is obliged to transport free of cost all material necessary in the improvement of the harbor at Sault Ste. Marie. The argument on behalf of the railway company derives no benefit from the maxim, *Noscitur a sociis*, as it might have done were the free transportation limited to munitions of

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war. We are remitted, therefore, to the simple question whether the word "troops" as here used includes an officer of the Engineer Corps of the Army. I do not see any escape from the conclusion that it must do so. Troops of the United States are the military forces of the United States, which necessarily include the Army of the United States. An officer of the Engineer Corps is a member of that army, and is therefore within the more general expression of the statute.

Your question in this case states that this officer was traveling upon business of the Government relating to improvements of rivers and harbors; but it can not be conceded, when the Government asks for transportation for any part of the Army over a railroad, that the railroad company has a right to ask, or that the Government is bound to state, the purpose of such transportation. It is enough that the person proposed to be transported is a member of the Army, and is upon Government business. The theory of this refusal would justify the railroad company in investigating and determining for itself in every case, whether the officer or body of men sought to be transported were engaged in an employment properly assignable to "troops." The improvement of a river or a harbor may or may not be with a view to facilitating future military operations. That is a matter exclusively for Government determination, and about which the railroad company has no right to inquire, and upon which public policy might forbid disclosure. Probably in time of war no one would pretend that members of the Engineer Corps of the Army would not be included under the name of "troops." Surely they are none the less "troops" in time of peace, nor are they any the less "troops" when professionally engaged in improving the navigation of a harbor than when constructing fortifications with a view to the protection of that harbor.

If there were doubt as to the correctness of this construction it must be resolved in favor of the Government on the principle laid down in *Slidell v. Grandejean* (111 U. S., 437). Says Mr. Justice Field, speaking for the court:

"It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms or as to its general

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purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often said that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to."

It follows that your first question must be answered in the negative. The president of the Michigan Central Railway Company was not justified in refusing free transportation to Colonel Poe over that part of his company's lines which had been aided by Government grant under the acts of Congress above quoted.

There remains to consider what action should be taken to compel the railroad company to comply with the requirements of its grant and to furnish the transportation requested of it. If it continues to refuse to comply with the law as above construed, it will be necessary to begin an action to forfeit the grant of the Government to the State of Michigan, and by that State to the railway company, for a breach of the condition subsequent. Upon your recommendation in the premises, I will direct the filing of a bill in equity in the circuit court for the eastern district of Michigan to effect this end.

The papers accompanying your request are herewith returned. The delay in answering your request was caused by the fact that your original letter was mislaid and was not found until the 23d of May of this year.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

EXCHANGE OF GOLD BARS FOR GOLD COIN.

The words "are hereby authorized," in the act of May 26, 1882, chapter 190, providing for the exchange of gold bars for gold coin by the superintendents of the coinage mints and of the assay office at New York, are to be construed as mandatory upon those officers. It is not discretionary with the Secretary of the Treasury to refuse such exchange, nor can he lawfully direct those officers so to do. A charge for the preparation of the bars cannot be exacted on an exchange thereof for coin under said act.

Exchange of Gold Bars for Gold Coin.

DEPARTMENT OF JUSTICE,
July 1, 1890.

SIR: By your letter of the 17th ultimo you invite the attention of the Attorney-General to the provisions of the act of May 26, 1882, authorizing the receipt, by superintendents of the mints and the New York assay office, of United States gold coin in exchange for gold bars, and you request his opinion upon the following questions:

"First. Does this act leave it discretionary with the Secretary of the Treasury to refuse to exchange gold bars for gold coin?

"Second. Would it be lawful under this act to impose the bar charge of 4 cents per \$100 in value for gold bars paid to depositors in exchange for United States gold coin?"

You state that the exchange provided for in the act, by reducing the expense, facilitates the exportation of gold from this country, a movement which it is not considered desirable to encourage.

The act of May 26, 1882, provided as follows: "That the superintendents of the coinage mints and of the United States assay office at New York are hereby authorized to receive United States gold coin from any holder thereof in sums not less than five thousand dollars, and to pay and deliver in exchange therefor gold bars in value equaling such coin so received."

The first question to which you request an answer turns upon the construction of the words "are hereby authorized." Do they impose a duty? or do they give simply a discretion to the depositaries of the power?

In the case of *The Supervisors v. United States* (4 Wall., 435), Mr. Justice Swayne, delivering the opinion of the court, stated the rule for the construction of statutory language, permissive or enabling in form, as follows:

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the

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law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"

This statement of the rule has full application to statutes concerning private rights, where power remedial in its character is conferred on officers. It is not in such a case to be presumed that the legislature intended to vest discretion in an officer by which he might withhold from a person what is his due.

But the rule is not of great assistance in statutes affecting public interests, as has been shown by Attorney-General Cushing (8 Opin., 546). It is neither beyond the power of a legislature, nor is it unusual, to vest a discretion in an officer to exercise authority conferred; and it must be admitted that enabling words are apt for the purpose. There is no general presumption against the giving of such discretion. The whole subject is very fully considered in *Julius v. The Lord Bishop of Oxford* (Law Rep., 5 Ap. Cases, 214). The words there to be construed were "it shall be lawful," and the rule by which their meaning was reached is thus stated by Lord Penzance:

"The words, 'it shall be lawful,' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing; and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred to exercise it."

And, as was said by Lord Cairns in the same case:

"The words 'it shall be lawful' being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obliga-

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tion exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

Following out the lines of inquiry suggested in the foregoing, we come first to the object of the act in question, which sufficiently appears from the report of the House committee recommending its passage. Such a report may be considered as a preamble to the law in construing it. (See Opinion of Attorney-General Wirt, 1 Opin., 597, 598.) This report (No. 862, vol. 3. House Reports, first session Forty-seventh Congress, 1881-'82) shows that by the export movement and by the melting for manufacturing purposes gold coin of the United States was being reduced in amount each year by many millions of dollars. That which was exported was melted and recoined in foreign countries. This loss, it was stated, could be saved if jewelers and exporters could exchange gold coin for gold bars. The object of the act plainly was, therefore, to reduce the expenses of the Government mints by reducing the amount of coinage necessary. The mode of accomplishing this was by the exchange of uncoined gold for gold coin. There is nothing in the report, and nothing in the debate, tending to show that Congress regarded it as a matter of public benefit to retard the exporting of gold. On the contrary, it was apparent to the legislature that unless the exchange did facilitate the movement of gold out of the country, the law would remain inoperative, for there would then be no inducement to any private owner to seek the exchange. Economy of public expenditures, then, being the only object of the act, it is not to be presumed that discretion was intrusted to public officers to defeat it.

But leaving the object of the act out of view, consider the position of the officers enabled by its terms. The superintendents of the mints and the New York assay office are under the supervision of the Director of the Mint (secs. 345, 3502, 3503, and 3504, Rev. Stat.), and the Director of the Mint, by section 343, Revised Statutes, is subject to the general direction of the Secretary of the Treasury. It is not reasonable to suppose that Congress, in reposing such a discretion in a

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public officer, would select one who was subject to the orders of a number of superiors. I have searched the statutes defining the powers and duties of the superintendents of the mints and the New York assay office, and nowhere is a discretion of a similar kind intrusted to those officers. Where discretion with reference to the financial policy of the Government is vested in an officer, it is in the Secretary of the Treasury.

Again, if a discretion is conferred on the superintendents, then each may act as seems best to him, and the exchange of bars for coin may be made in Philadelphia and refused in New York or San Francisco. Certainly Congress could not have intended such a disjointed operation of the act. It may be said that the Secretary of the Treasury may bring about a uniform exercise of this discretion. That is to say, however, that by giving discretion to the superintendents of mints, Congress intended really to put it in the Secretary of the Treasury. This is to imply a most awkward and unusual course in legislation.

I do not attach, in construing this act, any importance to the privilege extended to exporters and manufacturers, because it must be conceded that the act had nothing whatever to do with private rights, except that by offering a benefit to private owners of coin an exchange profitable for the Government was induced. Such persons, before the passage of the act, had no equitable right to the exchange, and can not, therefore, invoke the exercise of the power conferred by the act as a matter of justice to them.

The construction of this act as mandatory upon the superintendents of the mints and the New York assay office is founded not upon private rights at all, but is based upon the grounds:

First. That the act was intended to confer a public benefit, namely, economy in public expenditures.

Second. That if Congress had intended to vest a discretion it would have selected the Secretary of the Treasury instead of the subordinate officers named in the act as the depository.

Third. That it is unreasonable to suppose that Congress

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intended the disjointed operation of the act which would result if discretion is thereby conferred on subordinate officers in different cities.

The Secretary of the Treasury, therefore, can not direct the superintendents of the mint and assay office to refuse to exchange gold bars for gold coin under this act, and your first question must be answered in the negative.

As to your second question, I am of the opinion that you can not impose a charge of 4 cents a hundred, or any other sum, for the exchange of gold bars for coin. Section 3524, Revised Statutes, provided that the charges for the preparation of bars shall be fixed from time to time by the Director of the Mint, with the concurrence of the Secretary of the Treasury, so as to equal but not exceed, in their judgment, the actual average cost to each mint and assay office of the material, labor, wastage, and use of machinery employed in such case. That section, as enacted, referred to the exchange of bullion for coin or bars. The bullion was a cruder form of the metal, and a change of that into either coin or bars imposed upon the Government expense of manufacture. Where the Government receives coin for bars, however, the exchange results in a saving of expense of coinage to the Government. This was the object of the act. The imposition of such a charge would defeat that object by taking away from owners of coin the inducement to seek the exchange. In the absence of express enactment, therefore, the power to make the charge is not to be inferred.

Your second question must also be answered in the negative.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

Pension Agents.

PENSION AGENTS.

The provision in the act of June 30, 1890, chap. 639, entitled "An act making appropriations for the payment of invalid and other pensions," etc., requiring a new bond "from all pension agents now in office," is mandatory, and applies to all pension agents then in office, without any exception whatever.

DEPARTMENT OF JUSTICE,

July 5, 1890.

SIR: By your letter of the 1st instant you ask for an opinion of the Attorney-General upon the question whether, under the act "for the payment of invalid and other pensions of the United States for the fiscal year ending June 30, 1891," new bonds must be taken from all pension agents, or only from those availing themselves of the provision of the act which enables an agent, with the approval of the Secretary of the Interior, to delegate his powers as agent temporarily to his chief or other clerk. You accompany your request with a letter from the Commissioner of Pensions, and with an opinion of F. L. Campbell, chief law clerk in your Department. Mr. Campbell is of the opinion that it is your duty under the law to require new bonds from all the pension agents. I fully concur with Mr. Campbell.

The provision in the act on which the question arises (which I take from Mr. Campbell's written opinion) is as follows:

"For salaries of eighteen agents for the payment of pensions, at four thousand dollars each, seventy-two thousand dollars. In case of the sickness or unavoidable absence of any pension agent from his office, he may, with the approval of the Secretary of the Interior, authorize the chief clerk, or some other clerk employed therein, to act in his place, to sign official checks, and to dispose of all other duties required by law of such pension agent; and, with like approval, any pension agent may designate and authorize a clerk to sign the name of the pension agent to official checks. The official bond given by the principal of the office shall be held to cover and apply to the case of the person appointed to act in his place in such cases, and a new bond shall be required from all pension agents now in office. Such acting officer shall, moreover, for the time being, be subject to all the liabilities

Pension Agents.

and penalties prescribed by law for the official misconduct, in like cases, of the pension agent for whom he acts."

The suggestion of the Commissioner of Pensions seems to be that this act confers upon pension agents the personal privilege of delegating their powers to a subordinate; that a new bond is required to cover the additional risk incurred by the agent's new responsibility for his deputy; that so long as a pension agent does not avail himself of the privilege, a new bond is unnecessary; that Congress is not to be presumed to intend a useless requirement, and that therefore the provision is to be construed as applicable only to agents exercising the privilege.

I do not think this provision was enacted for the benefit of the pension agents only. It is more reasonable to suppose that it was passed to benefit the pensioners, and to prevent delays in payments to them, by reason of the temporary incapacity of the agent to act.

It is entirely consistent with and promotive of such an object that all agents shall give a bond at once which will make it possible at any time, and without delay when a contingency shall arise making it necessary, for any one of the agents to designate a subordinate to act in his stead.

But whether I am correct in this view of the object of the act or not, it is sufficient to say that the language requiring new bonds is mandatory, and in express terms applies to "all pension agents now in office." What Lord Coleridge said of acts of Parliament is equally true of acts of Congress, that it is better "to suppose that Parliament meant what Parliament has really said, and not to limit plain words in an act of Parliament by considerations of policy, if it be policy, as to which minds may differ, and as to which decisions may vary." (*Coxhead v. Mullis*, L. R., 3 C. P. D., 442.)

In my opinion new bonds should at once be required of all pension agents now in office.

The inclosures are herewith returned.

Respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

Appointments in Railway Mail Service.

APPOINTMENTS IN RAILWAY MAIL SERVICE.

Upon the facts submitted (which are set forth in the opinion) : *Advised* that the appointment of certain railway transfer clerks, who had not been examined and certified for appointment by the Civil Service Commission, was not within the amendment of clause 5 of Railway Rule II, adopted August 19, 1889, which excepts from examination clerks in the Railway Mail Service who are "employed exclusively as porters in handling mail matter in bulk, in sacks, or pouches, and not otherwise."

Section 1019 of the Postal Regulations (edition of 1887) can not prevail over, but must yield to the subsequently adopted amendment of said clause 5, which should be strictly confined to the class of transfer clerks therein mentioned.

DEPARTMENT OF JUSTICE,

July 8, 1890.

SIR: Your communication of June 3 ultimo, with the papers therein referred to, has received my consideration.

The question presented grows out of the appointment of three railway transfer clerks at Albany, N. Y., who had not been examined and certified for appointment by the Civil Service Commission.

The Civil Service Commission hold that these appointments were illegally made, because the appointees had not been examined as required by the civil service rules; while, on the other hand, the Superintendent of the Railway Mail Service contends that they were valid, as coming within the amendment of clause 5 of Railway Rule II, which was adopted August 19, 1889, and some months before the appointments were made.

The amendment of clause 5 excepts "from examination in the classified Railway Mail Service" "clerks employed exclusively as porters in handling mail matter *in bulk, in sacks, or pouches, and not otherwise.*"

The facts found on the spot by Civil Service Commissioner Lyman are that the duties of the transfer clerks in question were to "handle mail pouches and sacks, look after their safe-keeping, and transfer them between trains and between the post office and the trains; transfer registered matter in pouches or sacks between the depot and post-office; take letters from the station letter boxes and assort them for the

Appointments in Railway Mail Service.

out-going trains, delivering them to the railway mail clerks on the cars according to their proper destination. In transferring registered matter, the transfer clerk receiving it, whether at the train or at the post-office, is obliged to receipt for it, enter the packages in detail in a book kept by him, and obtain a receipt for them in this book from the party to whom they are delivered. The handling and transfer of open registered matter and the handling and assorting of letters taken from the depot boxes are as constant and habitual with these clerks as are the handling and transfer of closed sacks and pouches."

These facts were ascertained and communicated to the Civil Service Commission by Commissioner Lyman in obedience to instructions from the Commission to him, as appears by his letter of April 4, 1890, a copy of which is among the inclosures of your communication of June 3 ultimo, and do not seem to be controverted anywhere in the correspondence referred to me. I therefore assume them to be what they purport to be, rather than return the papers to you with the request that the Civil Service Commission be asked to make a statement of the facts involved, in conformity with the settled practice of this Department.

It is also stated that persons discharging the duties which the appointees in question have been performing are legally known and designated as clerks, and this we also assume as a fact in the case.

In view of these facts it is perfectly clear that the transfer clerks in question do not come under the amendment of clause 5 of Railway Rule II, which applies only to clerks "employed exclusively as porters in handling mail matter *in bulk, or sacks, or pouches, and not otherwise,*" and, consequently, I am of the opinion that these clerks should have been, examined, and that, not having been, they were appointed in violation of the rules lawfully established for the benefit of the civil service of the Government.

I am aware that section 1019 of the Postal Regulations (edition 1887, p. 367) provides that "division superintendents may, with approval of the General Superintendent, detail clerks at certain important junctions to look after the hand-

Oklahoma—National Banks.

ling of mails at railroad depots, and to perform such other duties pertaining to the Railway Mail Service as may be required. They will be entirely under the supervision of their division superintendent, and will look to him only for all instructions."

This regulation, however, can not prevail over, but must yield to the subsequently adopted amendment of clause 5, which should be strictly confined to the class of transfer clerks therein mentioned.

As to the question stated by Commissioner Lyman with regard to the legality of the payments of the salaries of the appointees, it is not properly before me, and therefore nothing herein is to be construed as an assent to the proposition that the money paid to these *de facto* clerks ought to be disallowed.

I have the honor to be, your obedient servant,

W. H. H. MILLER.

The PRESIDENT.

OKLAHOMA—NATIONAL BANKS.

In view of the provisions of the act of May 2, 1890, chap. 182, entitled "An act to provide a temporary government for the Territory of Oklahoma," etc.: *Advised*, that there no longer exists any obstacle to the establishment of national-banking associations in the Indian Territory.

DEPARTMENT OF JUSTICE,

July 9, 1890.

SIR: Your letter of June 24, 1890, asks an opinion "as to whether it is now lawful to establish national banks in Indian Territory, in view of the recent act of Congress, approved May 2, 1890 (Public, No. 100), to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States courts in the Indian Territory, and for other purposes."

I am of opinion that national banks may now be established in the Indian Territory.

The previously existing obstacle to holding this view has been removed by the above-mentioned act of Congress of May 2, 1890.

Pension—Dependent Parent.

The twenty ninth section of that act expressly provides that "The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and *all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States,*" * * * and that section also makes operative in the Indian Territory a large part of the general laws of the State of Arkansas; and the effect of this legislation is to extend over that Territory a system of laws adequate for the protection of life and property, and distinct from the laws in force by virtue of the right of self-government secured to the five civilized tribes inhabiting said Territory.

That Congress had power to legislate in that manner can not be questioned at this late day. (See *United States v. Kagama*, 118 U. S., 375, where the previous cases on the subject are considered.)

In view of all this, there can hardly be a doubt that it is the duty of your Department to give effect to the will of Congress that "all laws relating to national-banking associations shall have the same force and effect in the Indian Territory as elsewhere in the United States."

I am, very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

PENSION—DEPENDENT PARENT.

The first section of the act of June 27, 1890, chap. 634, entitled "An act granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor," etc., is to be regarded as an amendment of section 4707 Revised Statutes; and, so regarded, the word "soldier" employed therein should be construed to comprehend also sailor and marine—the term being used as a short expression to embrace all the persons under section 4707 whose death entitled their parents to a pension.

Pension—Dependent Parent.

DEPARTMENT OF JUSTICE,
July 10, 1890.

SIR: By your letter of the 1st instant you request that the Attorney-General advise you whether in the first section of the pension act approved June 27, 1890, a copy of which you inclose, the word "soldier" should be construed to include sailor and marine.

I think this is the necessary construction. The language of the section is as follows:

"That in considering the pension claims of dependent parents, the fact of the soldier's death by reason of any wound, injury, casualty, or disease, which, under the conditions and limitations of existing laws, would have entitled him to an invalid pension, and the fact that the soldier left no widow or minor children having been shown as required by law, it shall be necessary only to show by competent and sufficient evidence that such parent or parents are without other present means of support than their own manual labor, or the contributions of others not legally bound for their support: *Provided*, That all pensions allowed to dependent parents under this act shall commence from the date of the filing of the application hereunder, and shall continue no longer than the existence of the dependence."

In the other sections of the act there is no provision for the payment of pension claims of dependent parents, and we are obliged, therefore, in seeking the law under which such parents are to be paid, to look into statutes in force when the act in question became a law. Dependent parents have been heretofore provided for in section 4707, of the Revised Statutes, and in the act approved March 19, 1886. The latter act simply increased the amount of the pension, but did not change the requirements with reference to parents. The first section of the act of June 27, 1890, is to be regarded therefore as an amendment to section 4707, and should be considered with that section to give it a proper construction. The effect of the amendment is simply to render it unnecessary for parents of the person whose service is the cause of the pension to show that they had before been dependent

Pension—Dependent Parent.

on such person, or that he had recognized an obligation to support them—facts which were required by the original section 4707. Section 4707 applies to the parents of any person embraced within the provisions of section 4693 who has died since March 4, 1861, or shall thereafter die. There are several classes of persons described in section 4693, the first of which is as follows:

“Any officer of the Army, including regulars, volunteers, and militia, or any officer in the Navy or Marine Corps, or any enlisted man, however employed in the military or naval service of the United States, or in its Marine Corps,” etc., and this class, with the others, is by reference to be included in section 4707.

The first section of the act of June 27, 1890, inasmuch as it is an amendment to section 4707, might be properly changed to read as follows: “That in considering the pension claims of dependent parents under section 4707, the fact of the soldier’s death,” etc.

With such an interpolation it becomes evident that the word “soldier” in this connection was used as a short expression to embrace all the persons under section 4707 whose death entitled their parents to a pension. It could not have been intended by the incidental use of the word “soldier” to have thus discriminated between parents of soldiers and those of sailors and marines, when nowhere in previous pension laws has any such distinction ever been made. There is no reason for such distinction. If Congress had intended to make it, it would certainly have left no doubt of its meaning.

The title of the act is “An act granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor, and providing for pensions to widows, minor children, and dependent parents.” If it had been intended by the act to affect only the dependent parents of soldiers, such distinction would naturally have appeared in the title.

In section 2 and in section 3 the beneficial provisions of the present act are extended to all persons who served ninety days or more in the military or naval service of the United States in the late war of the rebellion and who have been honorably discharged therefrom. The first three sections are *in pari materia*, and in the absence of some express statement

Admiral's Secretary—Appointment of.

of an intention of Congress to make the distinction between soldiers and sailors and marines, I do not think the meaning of "soldier" can be limited to men engaged in the military service of the United States, but must be held to include at least the three—soldiers, sailors, and marines.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

ADMIRAL'S SECRETARY—APPOINTMENT OF.

The appointment of the secretary allowed the Admiral of the Navy by section 1367, Revised Statutes, does not belong to the President, with the advice and consent of the Senate, but devolves upon the Admiral as one personal to himself; and the contemporaneous continuation of the statute and uniform practice thereunder by the executive branch of the Government have accorded with this view.

DEPARTMENT OF JUSTICE,
July 10, 1890.

SIR: By letter of the 26th of May last you submitted for the consideration of the Attorney-General the question whether Mr. Alden, the present secretary of the Admiral, should be commissioned as such, with the rank of lieutenant, by and with the advice and consent of the Senate. You inclosed in your letter a copy of correspondence had between Admiral Porter, then Vice-Admiral, to the Secretary of the Navy, in August, 1866, in which the Vice-Admiral nominated Mr. Alden as his secretary, and the Secretary of the Navy approved the same. A letter from Mr. Alden, approved by the Admiral, and inclosed by you, refers to acts of Congress providing for a secretary, and cites an opinion of Attorney-General Cushing (6 Opin., 1) as authority for asking that a commission now issue to him as requested.

In my opinion Mr. Alden can not be commissioned by the President, by and with the advice and consent of the Senate.

Admiral's Secretary—Appointment of.

Section 1367, Revised Statutes, under which Mr. Alden was appointed, is as follows:

"The Admiral and Vice-Admiral shall each be allowed a secretary, who shall be entitled to the rank and allowance of a lieutenant in the navy."

This section embodies, without substantial change, an act of May 16, 1866 (14 Stat., 48), and the sixth section of an act approved July 25, 1866 (14 Stat., 222), as amended by the act of March 2, 1867 (14 Stat., 516.)

Attorney-General Cushing, in his opinion (6 Opin., 1) cited by Mr. Alden, held that the appointment of any officer of the United States belongs to the President of the United States, by and with the advice and consent of the Senate, unless there be an enactment to the contrary applicable to the excepted place. Undoubtedly this is a correct statement of the law. The only question to be solved here is, whether there is provision for the appointment of a secretary to the Admiral by some one other than by the President, by and with the advice and consent of the Senate.

The expression of the statute is that the Admiral "shall be allowed" a secretary. That, on its face, indicates that the appointment is to be personal to the Admiral, and so suggests that he is to make the selection.

The contention by Mr. Alden is, in effect, that the office of secretary to the Admiral is an independent office, to be filled without regard to the Admiral's nomination, and for a life term, like that of a lieutenant of the line. The language of the section creating the office seems to me to entirely refute such a claim. By section 1362 it is provided that when the office of Admiral becomes vacant, the grade shall cease to exist. If Mr. Alden's contention is correct, and he survives the Admiral, we shall have a secretary to the Admiral without an Admiral. It will then be a puzzling question to define the scope of his official duties. Congress could not have intended such an anomalous state of affairs.

But we are not left in doubt as to the necessary meaning of the words, "shall be allowed." When Congress gave the Admiral and Vice-Admiral secretaries, it had been the established practice in the Navy Department for forty years to allow commanders of fleets, squadrons, and divisions to ap-

Admiral's Secretary—Appointment of.

point secretaries to serve them while in command. (See Regulations 1865, sections 249 and 1811; Regulations 1832, chapter 25, section 32, page 30; Circular of Secretary Bancroft, November 24, 1845). And such secretaries were staff officers, with the relative rank of lieutenant. (See sections 5 and 21, Regulations 1865). Without any legislation, therefore, the Admiral and Vice Admiral, while in command on the sea, would have been allowed secretaries on their own appointment. The statutory provision under discussion simply extended the privilege of a secretary to these high officers of the Navy for their shore service also. The Naval Regulations are recognized by Congress in section 1547, and those in force when this statute was passed may properly be considered in construing it, because the presumption is that Congress enacted the law with the knowledge of and in the light of such regulations. It is fairly to be inferred, therefore, that in allowing secretaries to the Admiral and Vice-Admiral, Congress had in mind, and had no intention of changing, the long established regulation and practice under which naval officers appointed their own secretaries. It can not be supposed, in the absence of express provision, that Congress wished to deprive the Admiral and Vice-Admiral of the important privilege of selecting their confidential assistants, especially when such a privilege had always been accorded to officers inferior to them in rank.

It is hardly necessary to say that a nomination or appointment by the Admiral wholly negatives the possibility of an appointment by the President, by and with the advice and consent of the Senate. Appointments by the President are not made on the nomination of any one.

The conclusion reached is borne out by the practice under the law, now twenty years old. The secretaries were appointed by the Admiral and Vice-Admiral, respectively, shortly after the law was passed, with the approval of the Secretary of the Navy, and no President has ever since nominated them to the Senate. This is a contemporary construction of the act by the executive officers of the Government, which, under the decisions of the Supreme Court, is entitled to great weight. (See *United States v. Hill*, 120 U. S.

Mail Privileges of Congressmen.

R., 169; *Same v. Johnston*, 124 U. S. R., 236; *Robertson v. Downing*, 127 U. S. R., 607.)

The same result follows from the language of section 1410, Revised Statutes, which provides:

"That all officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, *and except secretaries and clerks*, shall be deemed petty officers," etc.

The necessary implication of this section is that secretaries are officers not holding commissions or warrants, and are not entitled to them. The only secretaries named in the statutes are the secretaries to the Admiral and Vice-Admiral and commanders of squadrons (see sec. 1556, p. 267, Rev. Stat). If secretaries do not hold commissions, and are not entitled to them, it follows that they are not appointed by the President, because appointments by the President are always evidenced by a commission.

For the reasons given, in my opinion the request of Mr. Alden should be denied.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE NAVY.

Approved:

W. H. H. MILLER.

MAIL PRIVILEGES OF CONGRESSMEN.

Where the seat of a member of the House, as Representative from a certain Congressional district, was contested, and the contestant, not the then sitting member, was adjudged by the House to have been elected a Representative from that district, and therefore entitled to the seat, whereupon he qualified and took his seat as such Representative: *Held* that the unseated member had no right thereafter to send public documents through the mail free of postage, under the proviso in the first section of the act of March 3, 1879, chapter 180.

DEPARTMENT OF JUSTICE,

July 11, 1890.

SIR: Your communication of June 23, ultimo, and the enclosures therein referred to, present for my opinion the following case:

Mail Privileges of Congressmen.

The Hon. George D. Wise took his seat as a member of the House of Representatives for the present Congress by virtue of credentials which stated that he had been elected a Representative for the Third Congressional district of the State of Virginia.

The right of Mr. Wise to the seat was contested before the House of Representatives by Mr. Edmund Waddill, jr., and the result of the contest was that in April last Mr. Waddill was adjudged and declared by the House to be entitled to the seat, and thereupon qualified and took his seat for the said district.

Notwithstanding that decision, Mr. Wise still claims the right to send public documents through the mail free of postage, and this is the question before me for opinion.

The law regulating the subject is to be found in a proviso of the first section of the act of March 3, 1879 (20 Stat., 356), entitled "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty." The proviso is as follows:

"Provided further, That from and after the passage of this act Senators, Representatives and Delegates in Congress, the Secretary of the Senate and Clerk of the House of Representatives, may send and receive through the mail, free, all public documents printed by order of Congress; and the name of each Senator, Representative, Delegate, Secretary of the Senate, and Clerk of the House shall be written thereon with the proper designation of the office he holds, and the provisions of this section shall apply to each of the persons named herein until the first Monday of December, following the expiration of their respective terms of office."

It is difficult to see any legal basis for Mr. Wise's claim. The issue between him and his contestant was, which of the two was the duly elected Representative for the said district, and that issue was decided by the House against Mr. Wise; so that it stands adjudged that he was not elected a member of the Fifty-first Congress, but that Mr. Waddill was.

It is true that Mr. Wise had *prima facie* right to the seat owing to the fact that the certificate was in his favor, and that he was a *de facto* member of the House until that *prima*

Exchange of Gold Bars for Gold Coin.

facie right was overthrown by the judgment of that body; but now that that *prima facie* right is overthrown, Mr. Wise must be treated and considered in disposing of the question before me as never having had a right to a seat in the Fifty-first Congress. As a consequence, therefore, Mr. Wise can not enjoy a privilege belonging to a member of the House when he is not a member.

It must be remembered that the decision of the House against Mr. Wise relates back to the very beginning of the term which was the subject of contest, so that Mr. Waddill became entitled to receive pay for all that part of the term during which Mr. Wise was the *de facto* incumbent.

The judgment of the House must necessarily have that retroactive effect, because the right to the seat is given *by the election* and not by the judgment, which merely declares which party *was elected*. At the same time, as the intruder was admitted to a seat on a color of title thereto, his acts have validity so long as his *de facto* incumbency existed; but it would hardly be in accordance with reason to allow a member, after being unseated, to go on exercising any privilege of membership when he is not even a *de facto* member. Mr. Wise, the unseated member, and Mr. Waddill, the seated member, can not both have the privilege in question as Representatives from the same Congressional district.

It results, therefore, that, in my opinion, Mr. Wise has no right to the free use of the mail upon the facts presented.

I have the honor to be, yours, very respectfully,
W. H. H. MILLER.

The POSTMASTER-GENERAL.

EXCHANGE OF GOLD BARS FOR GOLD COIN.

Opinion of July 1, 1890 (*ante*, p. 576), construing the act of May 26, 1882, chapter 190, with respect to the exchange of gold bars for gold coin, re-affirmed.

DEPARTMENT OF JUSTICE,
July 14, 1890.

SIR: As requested, I have carefully examined the opinion given to you by Acting Attorney-General Taft, under date of

Exchange of Gold Bars for Gold Coin.

July 1 instant, in relation to the question whether the statute of May 26, 1882, authorizing the receipt by superintendents of mints and the New York assay office of United States gold coin in exchange for gold bars is mandatory or only enabling in its character. I find myself constrained to concur in the opinion of the Acting Attorney-General. It is hardly worth while to go into a further statement of the reasons upon which this conclusion is based; suffice it to say that if this statute confers a discretion, such discretion is conferred upon subordinate officers, and is broader than any discretion as to the same subject-matter conferred upon the Secretary of the Treasury.

By the act of June 22, 1874 (18 Stat., 202), the Secretary was authorized to transfer to the office of the assistant treasurer at New York, from the bullion fund of the assay office at New York, refined gold bars bearing United States stamp of fineness, weight, and value, or bars from any melt of foreign gold coin or bullion of standard value to or above that of the United States, and apply the same to the redemption of coin certificates, *or in exchange for gold coin at less than par and not less than the market value, subject to such regulations as he may prescribe.* Here was a *discretion* vested in the Secretary, to be exercised at the office of assistant treasurer at New York, to exchange bars for coin. The act of 1882 authorizes these subordinate officers, namely, the superintendents of the coinage mints and of the United States assay office at New York, to make the exchange at their respective places. It may be doubtful whether the act of 1882 does not operate as a repeal of the act of 1874, so far as affects this question of exchanging bars for coin; but if it does not work such repeal, if it gives a discretion at all, it gives to at least one of these subordinate officers, namely, the superintendent of the assay office in New York, a discretion which might seriously conflict with that of the Secretary. As stated in the opinion of the Acting Attorney-General, this is a discretion which each of the officers to whom it is granted might exercise in a different way, if it be a discretion; and also a discretion in each officer not subject to the control of the Secretary. It is difficult to believe Congress ever intended such a state of things to exist. It is much more in harmony with the plain

Directions on Mail Matter.

purpose of the act, namely, the avoidance of the expense of coinage, to treat the act as mandatory.

Second. As to the question whether 4 cents a hundred dollars, the supposed expense of making the bars, can be charged, my conclusion also concurs with that of the Acting Attorney-General. As I understand it, in ascertaining the value of these gold bars the unbroken practice of the Government has been to fix the same solely by the amount of gold they contained, and without reference to the expense of making the bars. This being so, it is hardly to be supposed that Congress intended that another element should be considered in ascertaining the value for the purpose of this exchange.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

DIRECTIONS ON MAIL MATTER.

The following words printed upon the wrapper of a newspaper sent by mail, namely, "Sample copy; if not called for by party to whom addressed postmaster please deliver to some local teacher," held to be a direction for delivery within the meaning of section 1 of the act of January 20, 1888, chapter 2, and therefore permissible.

DEPARTMENT OF JUSTICE,
July 17, 1890.

SIR: I have examined the question submitted by your letter of July 8 instant, whether the Penman's Journal, a newspaper printed in the city of New York, can lawfully print upon the wrappers inclosing its "sample copies" an instruction to postmasters in the following words, to wit:

"Sample copy. If not called for by party to whom addressed postmaster please deliver to some local teacher."

In a supplemental note of July 11 the acting Postmaster-General advised me that the Penman's Journal is rated as second-class matter. The statute upon this subject is found in volume 25, United States Statutes at Large, page 1, and is as follows:

Directions on Mail Matter.

"Mailable matter of the second class shall contain no writing, print, or sign thereon in addition to the original print, except as herein provided, to wit: The name and address of the person to whom the matter shall be sent, index figures of subscription book either printed or written, the printed title of the publication and the place of its publication, the printed or written name and address without addition of advertisement of the publisher or sender, or both, and written or printed words or figures, or both, indicating the date on which the subscription to such matter will end, the correction of any typographical error, a mark except by written or printed words, to designate a work or passage to which it is desired to call attention, the words 'sample copy' when the matter is sent as such, the words 'marked copy' when the matter contains a marked item or article, and publishers or news agents may inclose in their publications, bills, receipts, and orders for subscriptions thereto, but the same shall be in such form as to convey no other information than the name, place of publication, subscription price of the publication to which they refer and the subscription due thereon."

Then follow provisions with reference to third and fourth class matter, and the section concludes as follows:

"In all cases directions for transmit, delivery, forwarding, or return shall be deemed part of the address; and the Postmaster-General shall prescribe suitable regulations for carrying this section into effect."

It is clear, I think, that if the words to which your question is directed are permissible at all, it is by reason of the portion of the section last quoted—

"In all cases directions for transmit, delivery, forwarding, or return shall be deemed part of the address." * * *

It would not be questioned that a direction that in case of non-delivery the postmaster should return to the sender, giving his name, would be lawful; neither do I suppose that it would be questioned if the direction were, in case of non-delivery to the original address, that it should be delivered to some second person named, such direction would be lawful. The only difference in the case under consideration is that the direction to the postmaster is to deliver to some one of a class. I am unable to see that in this fact there lurks any

Attorney-General.

violation of law. It is a direction for delivery, as I think, within the meaning of the language of the statute, and in my judgment, therefore, is lawful.

I have the honor to be, very respectfully, yours,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

ATTORNEY-GENERAL.

It is not within the province of the Attorney-General to consider questions looking to changes in maritime law to be accomplished by treaty with foreign Governments.

DEPARTMENT OF JUSTICE,
July 17, 1890.

SIR: Your communication of May 20 ultimo, inviting my attention to a letter from the Belgian minister at this capital, and certain propositions from His Majesty the King of the Belgians, looking to various changes in maritime law, to be accomplished by treaty, has received my attention.

I regret that it does not fall within the duties of the Attorney-General to enter upon a discussion of the interesting questions you have laid before me.

As you will see by section 356 of the Revised Statutes, "the head of any Executive Department may require the opinion of the Attorney-General on any questions of law *arising in the administration of his Department.*" This provision, as repeatedly construed by my predecessors, limits the function of the Attorney-General, in the matter of opinions requested by the heads of Departments, to questions arising out of the law as it is, and does not seem to call upon him to give his views and opinions upon the advisability of making changes, by treaty, in any department of jurisprudence.

The proposals of His Majesty the King of the Belgians are addressed, necessarily, to the treaty-making power of the United States, and involve international considerations which I do not think come within the province of the Department of Justice. At the same time, should negotiations be opened

Obstruction to Navigation.

upon these proposals, and any question of law arise in the course of them upon which you should desire my opinion, it will be my duty, as it will be my pleasure, to give it.

I have the honor to be, very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF STATE.

OBSTRUCTION TO NAVIGATION.

The bridge over the Muskingum River at Taylorsville, Ohio, is a nuisance to navigation which ought to be abated.

DEPARTMENT OF JUSTICE,
July 19, 1890.

SIR : I have carefully considered your communications and their inclosures with reference to the obstruction of the Muskingum River by a bridge at Taylorsville, Ohio, and am of opinion that the bridge is a nuisance to navigation which may be abated.

I would give my reasons for the conclusions reached but for the fact that Congress has, by sections 9 and 10 of the act of August 11, 1888 (25 Stat., 424, 425), referred such questions to the judicial department of the Government.

It seems to me, therefore, that I am going quite far enough when I say that the case falls within the sections referred to, and that, if legal proceedings under them should be necessary, I will, when requested by you, promptly institute them.

I return the tracing, as requested.

I have the honor to be yours, very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

Employment of Army Officers on Civil Works, etc.

EMPLOYMENT OF ARMY OFFICERS ON CIVIL WORKS, ETC.

The detail of an officer of the Army to report to the President of the World's Columbian Commission, with a view to his assignment by the latter to the duties of an engineer in the preparation and construction of buildings, grounds, etc., for the Columbian Exposition, is within the prohibition of section 1224, Revised Statutes, provided that the performance of such duties require the officer to be separated from his company, regiment, or corps, or interfere with the discharge of his military duties. *Senate* that where a leave of absence is asked by an Army officer, for the very purpose of enabling him to undertake the employments prohibited by said section, the granting of such leave would be an evasion of the statute and be unwarranted.

DEPARTMENT OF JUSTICE,

July 19, 1890.

SIR: By your letter of July 18 you submit for my opinion "the application of the restrictive provisions of sections 1222 and 1224, Revised Statutes, in the following cases:

"First. Hon. T. W. Palmer, president of the World's Columbian Commission, submits a copy of a resolution of the Commission requesting the Secretary of War to detail Col. H. C. Corbin, U. S. Army, to report to its president with a view to his assignment to such duties as he, the president, should determine. Mr. Palmer asks that Colonel Corbin's order be made to read in addition to his other duties, with the understanding that later on he will be for duty with the Commission altogether, should the Commission so request.

"Second. The other case is that of Capt. George W. Davis, who asks for a year's leave of absence without stating the purpose for which it is requested, but its basis as orally made known to me is an intention to enter the service of the Nicaragua Canal Company."

Section 1222 of the Revised Statutes reads as follows:

"No officer of the Army on the active list shall hold any civil office; whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his Commission shall be thereby vacated."

An examination of the act of Congress approved April 25, 1890, providing for the organization of the World's Colum-

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bian Commission, does not disclose that any "civil office" is created by that act, such as the requested assignment of Colonel Corbin seems designed to fill; but, for the purpose of answering your questions, it is necessary to determine whether the place for which this assignment is desired is to be regarded as a "civil office" or not. If it is, the acceptance of the same would, under section 1222, clearly terminate Colonel Corbin's connection with the Army. If it is not a "civil office," then the case of Colonel Corbin would, as to the law applicable thereto, stand upon the same footing as that of Captain Davis; and the questions as to both can be answered together.

Section 1224 of the Revised Statutes reads as follows:

"No officer of the Army shall be employed on civil works or internal improvements, or be allowed to engage in the service of any incorporated company, or be employed as acting paymaster or disbursing agent of the Indian Department, if such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper."

That the employment for which Colonel Corbin and Captain Davis are desired is within the language of section 1224 is too clear for doubt. The duties of an engineer in the preparation and construction of buildings, grounds, etc., for the Columbian Exposition is manifestly included under the head "civil works," as used in section 1224, and a detail of Colonel Corbin for such duties would contravene the statute, provided "such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper." Whether or not Colonel Corbin can perform these additional duties without interference with his military duties or separation from his corps is a question of fact with which this Department has nothing to do.

With reference to Captain Davis, the request is for a year's leave of absence, the request for leave not naming the purpose, but you state, as a fact, that it is for the purpose of taking employment during that time with the Nicaragua Canal Company. You also state that "the practice has prevailed in this Department to permit officers on leave to engage in the employment of private parties and corporations, in the

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view that their separation from their regiment or corps flowed from their leaves and not from the nature of their employment after their leave has been granted." If, in the exercise of the discretion vested in the proper authorities of the War Department, a leave of absence is granted upon satisfactory cause shown and for proper military reasons, and the officer to whom the leave is granted during the term of such leave engages in any of the employments spoken of in section 1224, that section is not violated; but if, as stated in this case, the leave is asked for the very purpose of enabling the officer to undertake the employments prohibited in that section, then a granting of such leave is a clear evasion of the statute, an attempt to do by indirection what the law forbids to be done directly, and is unwarranted.

I have the honor to be, very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

COLLECTION OF CUSTOMS DUTIES.

Merchandise which is in bond, or on shipboard within the limits of a port of entry, on August 1, 1890, is not subject to duty upon a valuation that includes the costs and charges mentioned in section 19 of the act of June 10, 1890, chapter 407, entitled "An act to simplify the laws in relation to the collection of the revenues." As to such merchandise the act of March 3, 1883, chapter 121, by which the costs and charges referred to are excluded as an element of dutiable value, remains in force and determines the duty thereon.

Commissions on imported merchandise which do not grow out of the costs, charges, and expenses mentioned in said section 19 of the act of June 10, 1890, form no part of the dutiable value of merchandise under that act.

DEPARTMENT OF JUSTICE,

July 22, 1890.

SIR: Your communication of July 8, instant, received at this Department on July 14, instant, presents for my consideration the following questions, arising upon the act of Congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues;" that is to say:

(1) "Whether goods which may be in bond, or on shipboard within the limits of a port of entry, at the time such act takes effect, viz, the 1st of August, 1890, shall be subject

Collection of Customs Duties.

to the increased duties prescribed by section 19 of the said act; that is to say, whether duties shall be taken, in addition to the regular duties prescribed by the law now existing, on the value of cartons, cases, crates, boxes, casks, coverings, and other charges specified in said section?" and

(2) "Whether, under the provisions of said section, duties shall be levied on 'commissions,' whether paid by the importers or not on such goods, and also on goods which may be imported subsequently to the said 1st of August next?"

Section 19 of the said act is as follows:

"That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported. That the words 'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale price as defined in this section."

By section 30 of the act it is provided "that this act shall take effect on the first day of August, eighteen hundred and ninety, except so much of section 12 as provides for the appointment of nine general appraisers, which shall take effect immediately."

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One of the results of this act's going into effect will be the repeal of section 7 of the act of March 3, 1883 (22 Stat., 523), which provides as follows:

"That sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States, and section fourteen of the act entitled 'An act to amend the customs, revenue laws, and to repeal moieties, approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or coverings of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

The question for solution is, did Congress intend that merchandise subject to an ad valorem duty and imported before the 1st day of August, 1890, and which shall be in bond or on shipboard on that day, should be dutiable on a valuation including the costs and charges named in section 19 of the new law?

It seems to me that Congress did not intend that the new law should have so harsh an operation. This, I think, is manifest from the following saving provisions of section 29 of the act: "But the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done or any right *accruing or accrued*, or any suit or proceeding had or commenced in any civil cause, before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made."

When merchandise arrives within the limits of a port of entry it is said to be imported, and thereupon the Government on the one hand has the right to demand the duties

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leviable thereon at the time of importation, and the importer, on the other, has the right to take possession of the merchandise on paying the duties leviable at that time. (*United States v. Howell*, 5 Cr., 368; *Arnold v. United States*, 9 Cr., 104.)

This right of the importer in the case supposed is, I think, a right that may be said to have accrued to him, and that continues and is enforceable, in the sense of the law, to the same extent as though the new legislation had not taken place. We are bound to take this view in order to prevent the inequitable result of subjecting the merchandise to a higher rate of duty when entered for consumption than it bore when imported; it being a familiar rule that laws should not be read in a retrospective sense to the prejudice of individuals, where it is possible to give them a prospective operation without doing violence to their language.

It was in furtherance of this rule that the Supreme Court held that merchandise *on shipboard, and in the custody of customs officers*, was within the provision of the act of March 3, 1883, which declares that "all imported goods, wares, and merchandise which may be *in the public stores or bonded warehouses* on the day and the year when this act shall go into effect, except as otherwise provided in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported, respectively, after that day." (*Hartranft v. Oliver*, 125 U. S. R., 525.)

It is the duty of the customs officers to take charge of merchandise on shipboard immediately on arrival, under sections 2875 and 2876, Revised Statutes, as was done in the case last cited, and I must presume that this duty was performed in the case before me.

It results, then, that merchandise in bond, or on shipboard in a port of entry, on August 1, 1890, is dutiable on a valuation which must not include the cost and charges mentioned in section 19 of the new act; in other words, the act of 1883 excluding such charges will remain in force after August 1, 1890, as to such merchandise.

I come now to the second question, as to commissions as an element of dutiable value, whether paid by the importer or not, with regard to merchandise in bond, or on shipboard

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in a port of entry, on August 1, 1890, or imported afterwards.

I do not see how commissions can properly form an element of dutiable value either under the act of 1883 or the act of June 10, 1890, unless they grow out of the costs, charges, and expenses mentioned in section 19 of the latter act, in which case they would, by force of the words "all other costs, charges, and expenses," etc., of the section, necessarily constitute a part "of the costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States."

Commissions of no sort can enter into valuation under the act of March 3, 1883, because that act (sec. 7) expressly repeals sections 2907 and 2908 of the Revised Statutes and section 14 of the act of June 22, 1874 (18 Stat., 189), which made commissions an element of dutiable value, and declares that "none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported."

The act of June 10, 1890, restores the legislation repealed by section 7 of the act of 1883, to the extent only of requiring "the costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States," to be added to "the actual market value or wholesale price" of such merchandise. This partial return to the old law was caused by the impossibility of executing satisfactorily section 7 of the act of 1883, as interpreted by the Supreme Court in *Oberteuffer v. Robertson* (116 U. S. R., 499), it being the case that the "costs, charges, and expenses mentioned in section 19 of the act of 1890 are in the majority of instances too intimately blended with the actual market value or wholesale price of merchandise to be separable from it. In addition to this, the law now about to expire, excluding such costs, charges, and expenses from valuation, opened the door for the fraudulent undervaluation of merchandise by means of the overvaluation of the receptacles, coverings, and appliances by which it was put in condition for market and exportation.

All this is very clearly presented in the report of the Committee of Ways and Means of the House of Representatives

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accompanying and recommending for passage the bill now become the act of June 10, 1890.

The act of 1890 having prevented the possibility of any more than a partial return to the provisions of law repealed by section 7 of the act of 1883, *by again repealing those same provisions*, I do not see how it can be said that commissions, as generally understood, and not growing out of the costs, charges, and expenses named in section 19 of the act of 1890, will form an element of dutiable value under that act. This is made still clearer by the report just referred to, which says of section 19: "While it returns to the former legislation and will accomplish the desired purpose, it does not include as dutiable items charges for inland transportation, shipment, transhipment, *commissions*, brokerage, insurance, export duties, etc., as provided in sections 2907 and 2908, Revised Statutes."

It follows, then, that my answer to the second question is in the negative.

I have the honor to be your obedient servant,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

EXPENSES OF COLLECTING CUSTOMS REVENUE.

The Secretary of the Treasury is not authorized to employ any part of the appropriation for collecting the revenue from customs in the erection of a temporary structure at a collection port for the purposes of the customs service.

No building, even of a temporary character, to be used for storage purposes, can be erected at the public expense without special authority from Congress.

DEPARTMENT OF JUSTICE,

July 23, 1890.

SIR: Your communication of July 7, instant, and July 21, instant, and the inclosures referred to in the latter, have received my consideration.

The question submitted in them for opinion is whether it is competent for the Secretary of the Treasury "to authorize the expenditure of a comparatively small amount, say a sum not exceeding a few hundred or a few thousand dollars, from

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the appropriation for 'collecting the revenue from customs,' for erecting a temporary structure at a customs collection port or subport, say Cleveland, Ohio, rendered immediately necessary by the exigencies and needs, and for the purposes of the customs service, and to secure a compliance with the general law pertaining to the customs service, but not such a structure as would in any way be such a permanent public building as Congress by special acts and appropriations from time to time authorizes the erection of for the use and accommodation of the public service at different cities; for instance, not such a public building as the one authorized by the specific act of Congress approved June 6, 1886 (24 Stat., 107), to be erected in El Paso, Tex."

Section 3687, Revised Statutes of the United States, makes a permanent annual appropriation of \$2,750,000 "for the expenses of collecting the revenue from customs for each half year, in addition to such sums as may be received from fines, penalties, and forfeitures connected with the customs, and from fees paid into the Treasury by customs officers, and from storage, cartage, drayage, labor, and services."

It seems to me that I am enabled, by Congress itself, to answer your question, without entering upon the difficult task of determining the limitations which are to be placed upon the general words "for the expenses of collecting the revenue."

By section 2954, Revised Statutes, the Secretary of the Treasury is authorized, at his discretion, to "lease such warehouses as he deems necessary for the storage of unclaimed goods, or goods which for any other reason are required by law to be stored by the Government," and section 2955 (*ibid.*) makes a further provision on the same subject.

It needs but to run over the various appropriation bills that have been made from time to time to see that Congress has been always particular to make special appropriations for the repairs and preservation and furnishing of custom-houses and other buildings under the control of the Treasury Department. It would be tedious and useless to cite the various instances.

The inference to be deduced from this action of Congress is, that it has never deemed expenditures for the purposes

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mentioned to come within the meaning of the appropriation for the "expenses of collecting the revenue."

It would seem that if anything could be intimately connected with the collection of the revenue it would be the leasing of warehouses for the storage of imported goods, and yet Congress has made that matter the subject of special enactment.

If, then, buildings for such purposes are leased by special authority, if the repairing and preserving and furnishing of custom-houses owned by the Government are allowed only by special authority, I do not see that the conclusion can be easily resisted that no building, even of a temporary character, to be used for storage purposes, can be erected without the special authority of Congress. To hold otherwise would open up to the Secretary a field of discretion in expenditures wider and more uncertain in its limits than any existing legislation seems to justify.

I have the honor to be, very respectfully,

W. H. H. MILLER.

. The SECRETARY OF THE TREASURY.

CASE OF CAPT. ADAM BADEAU.

B., a first lieutenant in the Army, having been appointed assistant secretary of legation at London, accepted the appointment on May 19, 1869, and entered upon the duties of the office on the 31st of same month. On the 25th of same month he was placed on the retired list as a captain, to date from May 18, 1869, on account of disability. He resigned the office of assistant secretary of legation December 6, 1869, and on April 28, 1870, was appointed consul-general at London, which office he held until September 16, 1881. His name was borne on the retired list continuously from the 25th of May, 1869, until May 7, 1878, when he was dropped from the Army, in conformity with an opinion of the Attorney-General, under section 1223, Revised Statutes. But his name was restored to the retired list July 3, 1878, by an order of the Secretary of War (on the assumption that his case was within the first proviso to section 2 of the act of March 3, 1875, chapter 178), and is still borne thereon: *Held* (1) that when B. accepted the appointment to and assumed the duties of secretary of legation at London he thereby, by force and effect of section 2 of the act of March 30, 1863, chapter 38, ceased to be an officer of the Army, and his place as such officer became vacant; (2) that neither the said act of March 3, 1875,

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nor the action of the Secretary of War above referred to, operated to reinstate him as such officer; and (3) that his name is not lawfully borne on the retired list of the Army.

The act of March 30, 1863, applied to officers on the retired as well as on the active list, and it made the acceptance of the diplomatic vacate the military office *eo instanti*; the vacancy thus created necessarily continuing until filled in the usual way.

The act of March 3, 1875, should be construed to have a prospective effect only.

DEPARTMENT OF JUSTICE,
July 29, 1890.

SIR: By your letter of July 25 you ask my opinion as to the status of Adam Badeau with reference to the Army, upon the following state of facts:

"Adam Badeau, of the Army, then a first lieutenant, was appointed April 21, 1869, assistant secretary of legation at London. He accepted the office May 19 following, and assumed his duties on the 31st of the same month. On the 25th of the same month he was placed upon the retired list as a captain, to date from May 18, on account of disability. He resigned the office of assistant secretary of legation December 6 of the same year, and was placed on duty in Washington. On the 28th of April, 1870, he was appointed consul-general at London, England, and continued in that office until September 16, 1881. His name was borne on the retired list until May 7, 1878, when he was 'dropped' 'in conformity with section 1223, Revised Statutes, and opinion of Attorney-General, dated December 11, 1887, to date from May 19, 1869.' His name was restored to the retired list July 3, 1878, by the Secretary of War, in an order reciting that his case came clearly within the proviso to section 2, act of March 3, 1875, relating to retired officers then borne on the list. It is now held by the Second Comptroller that Captain Badeau's connection with the Army entirely ceased May 19, 1869. From this view the Acting Judge-Advocate-General dissents. Reports from these officers and other papers relating to the case are herewith inclosed, from which it will be seen that Captain Badeau's military status has been a question before the Court of Claims and the Supreme Court of the United States. The question, then, to be determined, and upon which your opinion is desired, is, has Captain Badeau the

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legal right to have his name borne on the retired list of the Army?"

On the 19th day of May, 1869, when Lieutenant Badeau accepted the position of assistant secretary of legation at London, the following statute, enacted on the 30th of March, 1868 (15 Stat., 56), was in force:

"Any officer of the Army or Navy of the United States who shall after the passage of this act accept or hold any appointment in the diplomatic or consular service of the Government shall be considered as having resigned his said office, and the place held by him in the military or naval service shall be deemed and taken to be vacant, and shall be filled as if the said officer had resigned the same."

This statute is carried into the revision as section 1223, and continued in force without essential modification during the time Lieutenant Badeau held the place of assistant secretary of legation, and during a large part of the time he held the position of consul-general at London. The solution of the question you ask, therefore, depends upon the effect of Lieutenant Badeau's acceptance and tenure of this position in the diplomatic service pending that statute. If the acceptance of the diplomatic office vacated his military office, then, so far as he is concerned, the military office is still vacant, unless he has been re-appointed to the Army in the constitutional method.

This question seems to have been mooted for many years, and an attempt has been made to have it adjudicated in the courts, but no such adjudication has been reached. In *Badeau v. the United States* (130 U. S. R., 439), the court expressly declines to decide the question as not being necessarily involved in the case, using the following language:

"Whether by order of the Secretary of War, July 3, 1878, the claimant's name was properly restored to the retired list we are not called upon to determine in this case, because, even were that so, we do not think that his petition can be sustained."

The court did, however, in that case decide that the act of 1868, now embodied in section 1223, applies to officers upon the retired as well as upon the active list, saying:

"No officer, whether on the active or retired list, could ac-

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cept appointment in the latter” [diplomatic or consular service] “and remain an officer, but that rule was not applied to retired officers in the matter of holding a civil office.”

This is practically a declaration by the highest court in the land, that prior to 1875 an officer upon the retired list of the Army, who accepted an appointment in the diplomatic or consular service, thereby vacated his military office; and, consistently with the language of the statute, I do not see how any other position is tenable. The language of section 2 of the act of 1868 (sec. 1223) is expressed to the same effect. It says the acceptance of the diplomatic or consular office shall operate as a *resignation* and the military office thereby be made *vacant*. Vacant when? Manifestly immediately upon the acceptance of the other office. By the statutes, the holding of the two places in the same person is made inconsistent and impossible. The election to take one is *ipso facto* the relinquishment of the other. It is a complete resignation. The military officer goes into civil life; the military office is vacant, and may be filled by another appointment at once. It is a statutory resignation, yet it has all the essentials of an ordinary resignation. The officer, by accepting the civil office, tenders his resignation; the President, by appointing him to a civil office, consents to and accepts his resignation of the military office. This being so, Lieutenant Badeau, having elected to take the diplomatic office, was as completely out of the Army as if he had resigned in the ordinary way, been dismissed from the service, or died. If, prior to the pretended order of restoration by the Secretary of War, in 1878, this vacancy had been filled, will any one question that such action would have been valid? Yet certainly the question whether there is a vacancy is in no way dependent upon whether the proper authorities do or do not within any given time fill that vacancy. The point is that the statute makes the acceptance of the diplomatic office vacate the military office, and it vacates it *eo instanti*, and the vacancy thus made necessarily continues until it is filled in the ordinary way.

Thus, in *Barber v. Overman* (18 How., 137), the statute of Arkansas required the sheriff, as assessor, to file his oath within a certain time: “And if any sheriff shall neglect to

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file such oath within the time prescribed in the preceding section, his office shall be deemed vacant, and it shall be the duty of the clerk of the county court, without delay, to notify the governor of such vacancy."

On page 142 the court says: "The record shows that Peyton S. Bethel, the then sheriff of the county of Dallas, did not file his oath as assessor on or before the 10th of January, as required by law. He did file an oath on the 15th of March, but this was not a compliance with the law, and conferred no power on him to act as assessor. On the contrary, by his neglect to comply with the law his office of sheriff became *ipso facto* vacated, and any assessment made by him in that year was void and could not be the foundation for a legal sale."

So, in *Oregon v. Jennings* (119 U. S. R., 74), at page 90, it is held that a justice of the peace having resigned, his office is vacant and he has no further standing as such officer.

But it is needless to cite further authorities to the proposition that by this statute the action of Lieutenant Badeau, in accepting a diplomatic office, vacated his military office and put him out of the Army. The fact that his name remained on the rolls has no significance. It is simply evidence of a mistake of law in making those rolls.

It is claimed, however, that section 2 of the act of March 3, 1875, relieves this case from the effect of the act of 1868 above cited, and keeps this officer in the Army. That section, among other things, provides that "every such officer [one who has a leg or an arm permanently disabled by reason of resection] now borne on the retired list shall be continued thereon notwithstanding the provisions of section 2, chapter 38, act of March 30, 1868."

But it must be remembered that Lieutenant Badeau, as the result of his statutory resignation, had been out of the Army and his place therein vacant almost six years before the act of 1875 was passed. The act of 1875, when speaking of names on the retired list, meant names there legally, not by mistake either of law or fact.

The question is not whether the act of 1875 could retain a retired officer, within its provisions, in the Army, but whether it could put a man who had resigned and been six years a civilian back in the Army.

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Has anything since done restored him to the Army? The second subdivision of section 2, Article II, of the Constitution of the United States provides that—

"The President shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all *other officers of the United States whose appointments are not herein otherwise provided for*, and which shall be established by law. But Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments."

It will not be claimed that by any legislation the appointment of Army officers has been vested either in the President alone, in the courts of law, or in the heads of Departments. Such officers are and always have been appointed by the President, by and with the advice and consent of the Senate.

In *Mimmack v. The United States* (97 U. S. R., 437) an officer had placed his resignation, without date, in the hands of his commanding officer, to be acted upon in case he should again become intoxicated. It was so acted upon, sent to the President, accepted, and notice of such acceptance sent to the officer. A few months afterwards, on the application of the officer, the President attempted to annul the resignation and restore the officer to the Army.

The Supreme Court, on page 426, says: "Prior to the act of the 13th of July, 1866, the President could dismiss an officer in the military or naval service without the concurrence of the Senate, but he never could nominate and appoint one without the advice and consent of the Senate, as required by the Constitution. Since the passage of that act the President can not dismiss such an officer in time of peace, and certainly no vacancy in such an office can be filled without the advice and consent of the Senate; from which it follows that the opinion of the Attorney-General that the subsequent action of the President did not restore the petitioner to the military service is correct."

So in *Blake v. The United States* (103 U. S. R., 227), it is held that the President may remove an officer of the Army by an appointment of his successor by and with the advice

Case of Capt. Adam Badeau.

and consent of the Senate, and on page 237 the court says of such removed officer: "Having ceased to be an officer in the Army, he could not again become post chaplain except upon a new appointment by and with the advice and consent of the Senate."

So in *United States v. Corson* (114 U. S. R., 619), it was held that an officer of volunteers in the Army dismissed from the service during the recent civil war by order of the President could not be restored to his position merely by a subsequent revocation of that order.

The court says (page 622): "The death of the incumbent could not more certainly have made a vacancy than was created by President Lincoln's order of dismissal from the service. And such vacancy could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate were necessary, unless the vacancy occurred in the recess of that body, in which case the President could have granted a commission to expire at the end of its next succeeding session.

"It results that, as the appellee was dismissed from the Army during the recent war by a valid order of the President, and as he was not reappointed in the mode prescribed by law, he was not entitled as an officer of the Army to the pay allowed by statute for the period in question."

Nor will it do to say that by consenting to the act of 1875 the President and Senate have consented to the appointment of Lieutenant Badeau as one of a class. First, it is a *non sequitur* and the President has consented to a statute. Acts of Congress may, and often do, become operative as laws without his consent and over his veto.

Again, the President and the Senate cannot make appointments by classes and general legislation. The Constitution contemplates that an appointment shall be made upon the separate consideration first by the President and afterward by the Senate of each individual case by name, and upon its own merits; and this constitutional requirement is in no way met by a law which would induct men into office by classes. To hold otherwise would enable a two-thirds majority of each House of Congress, acting together, to legislate any number of men by name or by a class into office

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without the consent of the President at all. Of course such legislation would be absolutely void.

Coming to the case in hand, if the language of the act of 1875 were such as to restore to office in the Army any officer who had vacated such office, it would be clearly unconstitutional and invalid; but such is not its necessary reading. When, giving legislation a retroactive effect, it is invalid, but giving it a prospective effect it is valid, all rules of construction require that it shall be given a prospective effect only; and such is the rule which is and should be applied to this act of 1875.

My conclusion is, therefore,

(1) That when Lieutenant Badeau accepted and assumed the duties of the office of secretary of legation at London he thereby *ipso facto* ceased to be an officer of the Army, and his place as such officer became vacant.

(2) That neither the act of 1875 nor any of the executive acts referred to in your letter has restored him to the Army; and he has, therefore, no legal right to have his name borne on the retired list of the Army.

I have the honor to be, yours, very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

ENLISTED MEN OF THE MARINE CORPS.

The act of February 9, 1889, chapter 119, "to provide for the deposit of the savings of seamen of the United States Navy," does not extend to enlisted men of the Marine Corps.

The provisions of section 1 of the act of June 16, 1890, entitled "An act to prevent desertions from the Army, and for other purposes," are applicable to enlisted men of the Marine Corps by force and effect of sections 1612, Revised Statutes; but those of sections 2, 3, and 4 of that act are inapplicable thereto.

DEPARTMENT OF JUSTICE,

July 31, 1890.

SIR: In your communication of July 21, instant, you request an opinion, first, as to whether enlisted men of the Marine Corps serving on shipboard or on naval stations on

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land are entitled to the benefit of the act of February 9, 1889 (25 Stat., 657), entitled "An act to provide for the deposit of the savings of seamen of the United States Navy;" and, secondly, as to whether sections 1, 2, 3, and 4 of the act of June 16, 1890, entitled "An act to prevent desertions from the Army and for other purposes," are to be construed as applicable to the enlisted men of the Marine Corps.

As to the first question, section 1 of the act of February 9, 1889 (*supra*), provides as follows:

"That any enlisted man or appointed petty officer of the Navy may deposit his savings, in sums not less than five dollars, with the paymaster upon whose books his account is borne; and he shall be furnished with a deposit-book, in which the said paymaster shall note, over his signature, the amount, date, and place of such deposit. The money so deposited shall be accounted for in the same manner as other public funds, and shall pass to the credit of the appropriation for 'Pay for the Navy,' and shall not be subject to forfeiture by sentence of court-martial, but shall be forfeited by desertion, and shall not be permitted to be paid until final payment on discharge, or to the heirs or representatives of a deceased sailor, and that such deposit be exempt from liability for such sailor's debts: *Provided*, That the Government shall be liable for the amount deposited to the person so depositing the same."

Section 2 relates to interest on the deposits provided for in section 1, and section 3 confers power on the Secretary of the Navy to make regulations for carrying the act into effect.

This law does not refer to the Marine Corps by name, but in its title mentions "seamen" as the persons for whose benefit it was made, while section 1 extends the benefit of the act to "*any enlisted man or appointed petty officer of the Navy.*" It also provides that "the money so deposited" shall pass to the credit of the appropriation for "Pay for the Navy," and "shall not be permitted to be paid until final payment on discharge, or to the heirs or representatives of a deceased *sailor*, and that such deposit be exempt from liability for such sailor's debts;" and section 2 prescribes the conditions on which the *sailor* shall be paid interest on such deposit on his final discharge. In its *literal sense* it would

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seem that this law does not embrace any branch of the service but the Navy proper.

But the literal sense of the law is not necessarily its true sense, for if, by taking the law by its four corners or by looking at it in the light of the circumstances in which it was passed, or by doing both, it appears that its meaning should be restricted or enlarged in order to carry out the intention of the legislature, it is the duty of the expounder to limit or amplify that meaning, as the case may require.

It therefore becomes necessary to consider whether, without violation of the well-settled rules of interpretation, it may be held that enlisted men of the Marine Corps, serving on board ship or at naval stations on land, are entitled to participate in the benefit of the act of February 9, 1889.

The military establishment of the United States consists of three principal organizations, the Army, the Navy, and the Marine Corps. Each has an organization distinct from that of the others, as plainly appears in the Revised Statutes, and each is the object of a distinct annual appropriation by Congress.

The organization of the Marine Corps is assimilated to that of the Army, but its sphere of duty is mostly on board ship or at naval stations on land, and it may be called the police of the Navy; while, on the other hand, it is always liable to be ordered to serve in conjunction with the Army, and it is subject to the articles of war or the articles for the government of the Navy, according as it serves with the one or the other of these branches of the service.

That the Marine Corps has a closer affinity with the Navy than with the Army is manifest both from its designation and from section 1621 of the Revised Statutes, which declares that this corps "*shall at all times* be subject to the laws and regulations established for the government of the Navy, *except when detached for service with the Army* by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army."

According to this provision, the service of the Marine Corps with the Navy is its *usual and regular* service, while that with the Army is *unusual and exceptional*. This view was

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substantially adopted by the Supreme Court in *United States v. Dunn* (120 U. S. R., 249). After a careful survey of all the legislation on the subject, the court says: "It seems to us that these provisions of the Revised Statutes, bringing together the enactments of Congress on the subject of the Marine Corps, show that the primary position of that body in the military service is that of a part of the Navy, and its chief control is placed under the Secretary of the Navy, there being exceptions, when it may, by order of the President or some one having proper authority, be placed more immediately, for temporary duty, with the Army, and under the command of the superior army officers." The same view was taken in the case of *Wilkes v. Dinsman* (7 How., 89).

In view, then, of this peculiar and irregular position of the Marine Corps in the public service, it is not at all surprising that instances occur where legislation in terms confined to the Army and Navy has been held to include the officers and men of the Marine Corps.

The above cited case of *United States v. Dunn* is one of these instances. The question in that case was whether a gunner in the Navy was, as a warrant officer, entitled to have credit for the time he had previously served as an enlisted man in the Marine Corps under the following provision of the act of March 3, 1883 (22 Stat., 473), namely:

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service."

The accounting officers of the Treasury had refused to allow the credit asked for, on the ground that service in the Marine Corps was not service in the Army or Navy; but the Supreme Court, affirming the judgment of the Court of Claims, held that service as a marine on board ship or at naval stations on land was service in the Navy, and that, in so far as such service was with the Army, it was also service in the Army, within the meaning of the law. It will be ob-

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served that the court held that service as an enlisted marine was entitled to be credited as service as an enlisted *man* in the Navy.

The equity of the applicant for the credit was strong, and the general term, "enlisted man," used in the statute enabled the court to give effect to that equity.

Turning now to the act on which the question in hand arises, it does not seem to me that the considerations and arguments relied on by the Supreme Court in *United States v. Dunn* and *Wilkes v. Dinsman (supra)* have any application to that act, because it extends the deposit system to *seamen* and *sailors*, and uses the term "enlisted men of the Navy" only once, and then only, I am constrained to think, as synonymous with seaman or sailor. The use of these terms, so inapplicable to marines, and the requirement that money deposited under the act shall pass to the credit of the appropriation for "*pay for the Navy*," seem to show that marines were not in contemplation. There being annually an appropriation for pay for the Marine Corps, separate and distinct from that for the Navy, I see no reason why deposits made by marines were not directed to be passed to the credit of that appropriation, if it had been intended to embrace that branch of the service.

Another reason that operates with me against straining the language of the act of February 9, 1889, is that in nearly all cases where Congress intends to legislate with reference to the Marine Corps it designates it especially, even in cases where it might properly be held to be included by the term navy; as, for example, in the pension laws and the laws establishing hospitals for the Navy; which shows, I think, that Congress has not always regarded the term navy as a sufficiently clear designation for the Marine Corps.

Therefore, in disposing of the question before me, it seems better to keep clearly within the rules of interpretation, by taking the words of the law in their ordinary sense and as applicable to seamen or sailors and not marines, and to leave it to Congress, by additional legislation, to extend the benefit of the law to the Marine Corps, if it should think proper to do so.

If this act stood alone on the use of the term "enlisted

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man" in the first section, the Dunn case might properly be accepted as conclusive. But the use of the word "seamen" in the title and "sailor" in several other places in the act seems to show that Congress was legislating only in regard to seamen proper, and therefore the Dunn case is not in point.

As sufficiently appears already, my opinion is that the act of February 9, 1889, does not embrace enlisted men in the Marine Corps.

This brings me to the consideration of the second question, namely, whether sections 1, 2, 3, and 4 of the act of June 16, 1890, entitled "An act to prevent desertions from the Army, and for other purposes," are to be construed as applicable to the enlisted men of the Marine Corps.

Sections 1, 2, 3, and 4 of the act of June 16, 1890, are in the following words:

"SEC. 1. That from and after the first day of July, eighteen hundred and ninety, there shall be retained from the pay of each enlisted man of the Army the sum of four dollars per month of his monthly pay for the first year of his enlistment, which said sum shall not be paid him until his discharge from the service, and shall be forfeited unless he served honestly and faithfully to the date of discharge: *Provided*, That the Secretary of War shall determine what misconduct shall constitute a failure to render honest and faithful service within the meaning of this act; but no soldier who has deserted at any time during the term of an enlistment shall be deemed to have served such term honestly and faithfully; *Provided, also*, That the sums retained from the monthly pay of enlisted men, in accordance with section one of this act and sections twelve hundred and eighty-one and twelve hundred and eighty-two of the Revised Statutes, shall be treated as deposits, upon which interest shall be paid as provided in sections thirteen hundred and five, thirteen hundred and six, thirteen hundred and seven, and thirteen hundred and eight of the Revised Statutes, the said sums to bear interest from the end of the year of the soldier's enlistment in which they shall have accrued.

"SEC. 2. That enlistments shall continue to be made for five years, as now provided by law: *Provided*, That at the end of three years from the date of his enlistment every sol-

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dier whose antecedent service has been faithful shall be entitled to receive a furlough for three months, and that in time of peace he shall at the end of such furlough be entitled to receive his discharge upon his own application: *Provided, further,* That soldiers discharged under the provisions of this section shall not be entitled to the allowances provided in section twelve hundred and ninety of the Revised Statutes.

"SEC. 3. That United States marshals and their deputies, sheriffs and their deputies, constables, and police officers of towns and cities are hereby authorized to apprehend, arrest, and receive the surrender of any deserter from the Army for the purpose of delivering him to any person in the military service authorized to receive him.

"SEC. 4. That in time of peace the President may, in his discretion, and under such rules and upon such conditions as he shall prescribe, permit any enlisted man to purchase his discharge from the Army. The purchase money to be paid under this section shall be paid to a paymaster of the Army and be deposited in the Treasury to the credit of one or more of the current appropriations for the support of the Army, to be indicated by the Secretary of War, and be available for the payment of expenses incurred during the fiscal year in which the discharge is made."

By section 1612, Revised Statutes, it is provided that the officers of the Marine Corps shall receive the same pay and allowances and the enlisted men of the corps shall receive the same pay and bounty for re-enlisting "as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army." This section is made up of section 3 of the act of June 30, 1834 (4 Stat. 713), and a provision of section 1 of the act of August 5, 1854 (10 Stat., 586).

As section 1 of the act of June 16, 1890, is, in effect, amendatory of sections 1281 and 1283, and refers to them and relates to the same subject-matter, it follows that that section, like the others, is made applicable to the Marine Corps by section 1612, which was intended to operate *upon future* as well as existing legislation on pay, allowances, and bounty in the Army.

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It may be said, furthermore, that Congress must be presumed to have known the long standing practice hereafter referred to, of treating sections 1281, 1282, and 1290 as applicable to the Marine Corps, and may well be supposed to have contemplated that section 1 of the act of 1890 would be held also applicable to the corps.

Moreover, in your communication submitting the question under consideration, you inform me that "it is the practice of this Department and of the accounting officers of the Treasury to apply to the enlisted men in the Marine Corps, in regulating the pay and increase thereof on account of service, the retention of pay until the expiration of enlistments, and allowances for transportation from the place of discharge to the place of enlistment, the provisions of sections 1281, 1282, and 1290 of the Revised Statutes."

The sections referred to by you, in the passage just quoted, form part of the legislation regulating the pay of enlisted men in the Army, and are, I think, applicable to the Marine Corps by force of section 1612. It is to be remembered that the legislation embodied in those sections has been substantially the law for many years, and that the Navy Department and the accounting officers of the Treasury have been used to regard it as applicable to the Marine Corps. This practice I would consider as settling the question, if I had any doubt on the subject, as great deference is due to the practical construction put on a doubtful law by the officers who apply it to its subject-matter (*United States v. Hill*, 120 U. S. R., 169).

It remains to consider the other sections of the act of June 16, 1890.

In such consideration the proposition, settled in the Dunn case (*supra*), that the Marine Corps, except when otherwise specially provided, is classified rather as a part of the Navy than of the Army, must be kept in mind.

Section 2 declares that enlistments shall be made for five years, and provides that at the end of three years from the date of his enlistment every soldier shall be entitled to a furlough for three months, and in time of peace may be discharged at the expiration of the furlough on his own application, and it further provides that the soldier so discharged

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shall not receive the allowances given by section 1290, Revised Statutes.

So far as I am able to discover, there is no provision of law, certainly no such provision is among the several references kindly furnished by you, under which this section can be held applicable to the Marine Corps. Its main object is to allow furloughs under certain conditions, and its reference to section 1290 is incidental to that subject only.

And I am equally at a loss as to any statute under which it may be held that sections 3 and 4 are applicable to the Marine Corps. You point to no such legislation, and I can find none. Section 3 empowers certain civil officers to arrest deserters, and section 4 provides for the purchasing of his discharge by any enlisted man in the Army.

As there is neither statute nor departmental usage modifying the ordinary meaning of the language of these three sections as applicable to the Army only, it results that, in my opinion, sections 2, 3, and 4 of the act of June 16, 1890, were not intended to embrace the Marine Corps.

I have the honor to be, very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE NAVY.

CIVIL SERVICE—APPLICATION FOR EXAMINATION.

The words "departmental service" and "the service," as used in the proviso in that part of the legislative, executive, and judicial appropriation act of July 11, 1890, chap. 667, which relates to the Civil Service Commission, mean the classified civil service as established by section 163, Revised Statutes, and section 6 of the act of January 16, 1883, chapter 27.

The words in the same proviso, viz, "promotion or appointment in other branches of the Government," signify promotion or appointment in the classified service of some other Department than that to which the applicant may belong.

Semel that an application for a transfer is not within the exception of the proviso.

Congress not having designated in the proviso any particular county officer or officers who may make the certificate required to accompany the application, this matter must be presumed to have been left as a subject for regulation by the Civil Service Commission.

CIVIL SERVICE—APPLICATION FOR EXAMINATION.

DEPARTMENT OF JUSTICE,

August 2, 1890.

SIR : Your communication of the 29th of July ultimo submits for opinion a series of questions arising upon the following proviso contained in the legislative, executive, and judicial appropriation act approved July 11, 1890, in connection with the appropriations for the Civil Service Commission ; that is to say : “*Provided*, That hereafter every application for examination before the Civil Service Commission for appointment in the departmental service in the District of Columbia shall be accompanied by a certificate of an officer, with his official seal attached, of the county and State of which the applicant claims to be a citizen, that such applicant was at the time of making such application an actual bona fide resident of said county, and had been such resident for a period of not less than six months next preceding ; but this provision shall not apply to persons who may be in the service and seek promotion or appointment in any other branches of the Government.”

(1) The first question is, “whether the word ‘service,’ in the last clause of the proviso, can be held to mean ‘classified departmental service,’ in view of the fact that the proviso relates to applications for examination for that service only ; or, if not, then to what the word does apply.”

The proviso in question is appended to the following clause or item in the said act, namely : “For necessary traveling expenses, including those of examiners acting under the direction of the Commission, and for expenses of examinations and investigations held otherwise than at Washington, five thousand two hundred and fifty dollars.”

It is observed, furthermore, that this clause and its proviso are to be found in a division of the act which is entitled “Civil Service Commission.”

The word “service” occurs three times in the proviso. First, as a part of the legal designation of the Commission, a use of the word which calls for no further notice in this discussion ; secondly, in confining the proviso to applications for examination “for appointment in the *departmental service* in the District of Columbia ;” and, thirdly, in excepting from

CIVIL SERVICE—APPLICATION FOR EXAMINATION.

the operation of the proviso “persons who may be in the service and seek promotion or appointment in other branches of the Government.”

I am quite satisfied that the words “departmental service” and “the service” as used in the proviso mean one and the same thing, namely, *the classified civil service*, as established by section 163 of the Revised Statutes and paragraph 3 of section 6 of the civil service act of January 16, 1883. This seems free from doubt, when we construe the language of the proviso with direct reference to its subject-matter, which is the limitation within which the words of the law-giver are to be confined.

To make this answer complete, however, it remains to be said that the full meaning of the words “who may be in the service and seek promotion or appointment in any other branch of the Government” is as though expressed in the following language, namely: who may be in the classified civil service in any Department and seek promotion or appointment in any other Department of the Government. To belong to the classified departmental civil service at all means, undoubtedly, to be in that service *in some one Department*. I would add that there seems to be a good reason for the exception in favor of applicants from outside the District of Columbia, already in the service, for promotion or appointment, namely, that their continued residence in the District might render it difficult for them to obtain the required certificate. It was for this reason, no doubt, deemed unjust by Congress to make this stringent legislation applicable to such cases.

(2) The second question is, “whether the words ‘promotion or appointment in other branches of the Government,’ can be held to mean promotion or appointment in other branches of the classified departmental service of the Government, and be thus limited in their application; or, if not, then what their meaning and limitation are.”

My opinion is, as already stated, that the words “promotion or appointment in any other branches of the Government” mean promotion or appointment to the classified civil service of some other Department than that to which the applicant may belong. I am not called on to consider

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whether there can be a promotion from the service in one Department to that in another, as there can be an appointment, and, consequently, do not consider that question.

(3) The third question is, "whether the persons whose cases are stated above must comply with the requirement of the proviso, or are exempted from such compliance under the last clause thereof?"

What has been said already will enable the Civil Service Commission to dispose of each case mentioned by them, without difficulty. I would add, however, with reference to the case of Thomas P. Kingsbury, that it is not entirely clear whether the application is for transfer or promotion or appointment. If it is for a transfer merely, it does not fall within the exception of the proviso.

(4) The next question is, "what officers may make the certificate required."

The law says that every application for examination "shall be accompanied by a certificate of an officer, with his official seal attached, of the county and State of which the applicant claims to be a citizen, that such applicant was," and so forth.

Congress has not seen fit to designate any particular county officer, and therefore must be presumed to have left it to the Civil Service Commission to make that matter the subject of a regulation. It was, no doubt, wise in Congress to stop with the requirement that the certificate shall be made by some officer of the county and State of which the applicant claims to be a resident, for the designation by Congress of an officer or officers might have led to difficulty, in view of the differences in the particular of county organization in some of the States, and the changes in that particular that are going on pretty much all the time.

I have the honor to be, yours, very respectfully,

W. H. H. MILLER.

The PRESIDENT.

Fort Selden, New Mexico.

FORT SELDEN, NEW MEXICO.

Where application was made to the Secretary of War for license to construct and maintain an irrigating ditch through the military reservation at Fort Selden, N. Mex., the licensee to furnish free to the United States all water required for military purposes: Advised that, in view of the benefits to be derived by the fort from the use of the water and other considerations, such license may properly be granted under well considered restrictions and revocable at the will and pleasure of the Secretary.

DEPARTMENT OF JUSTICE,

August 4, 1890.

SIR: Before considering the questions submitted for opinion by your communication of February 20, ultimo, I beg to say that it would have received earlier attention but for one of those accidents (the mislaying of the papers) which may occur in any well-regulated service.

The questions for consideration are:

(1) Has the Secretary of War the legal authority to grant a license, revocable at the pleasure of the Secretary of War, to construct and maintain an irrigating ditch through a United States military reservation?

(2) If the Secretary of War has such authority, what conditions should be imposed in the case under consideration?

As the second question is not one of law, and is therefore beyond the competency of this Department, I will proceed to consider the first question only.

This question I must confine to the actual case which was before you for action, namely, an application to you by one W. H. H. Llewellyn for a revocable license to enter upon the military reservation at Fort Selden, N. Mex., and construct and maintain thereon an irrigating ditch 30 feet wide and 5 feet deep along a specified route, upon condition that no right, no claim shall arise against the United States in consequence thereof, and that the licensee shall furnish free to the United States all water required for military purposes.

It has been the practice for many years for the Secretary of War, and sometimes the President, as the files of your Department will no doubt show, to grant revocable licenses to individuals to enter upon military reservations and prose-

Deputy Surveyor of Customs.

cute undertakings there which may be beneficial to the military branch of the public service as well as advantageous to the licensees.

For many years a part of the tracks of the Baltimore and Ohio Railroad Company was laid by a revocable license on a part of the land at Harper's Ferry used by the United States for a manufactory of arms. Under a similar license a part of the land belonging to the fort at Old Point Comfort was allowed to be used as a site for a hotel, and in 1861 President Lincoln gave a license of this kind to a railroad company to use a part of the Government land at Sandy Hook, and in 1869 another license was granted to said company to use part of the same land "so long as it may be considered expedient and for the public interest by the Secretary of War, or other proper officer of the Government, in charge of the United States lands at Sandy Hook." (See 16 Opin., 212.)

In this case the license applied for relates to a military reservation situated in an arid region, and therefore, in view of the advantage to Fort Selden of the use of this water, and in view of the frequent exercise of a similar power by granting such licenses as occasions have arisen through so many years, it seems clear that such license may be granted, the same to be under well considered restrictions and revocable at the will and pleasure of the Secretary of War.

I have the honor to be, yours, very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

DEPUTY SURVEYOR OF CUSTOMS.

There is no statutory provision authorizing the appointment of more than one deputy surveyor of customs, at the same time, at each of the ports named in section 2722, Revised Statutes.

DEPARTMENT OF JUSTICE,

August 5, 1890.

SIR: Your note of the 30th ultimo, asking an opinion as to whether the Treasury Department has power, under the provisions of section 2722, Revised Statutes, to appoint more than one deputy surveyor of customs at each of the ports

Deputy Surveyor of Customs.

named therein, is received. That section is as follows: "The deputy surveyors at New York, Boston, Portland, Philadelphia, Baltimore, New Orleans, and Portland, in Maine, shall receive a salary of two thousand five hundred dollars a year each, payable out of the appropriation for expenses of collecting the revenue from customs."

I am unable to find any statute authorizing the Secretary of the Treasury to appoint a deputy surveyor of customs.

By section 2630 it is provided that "every collector of customs shall have authority, with the approval of the Secretary of the Treasury, to employ within his district such number of proper persons as deputy collectors of the customs as he shall deem necessary; and such deputies are declared to be officers of the customs. And in cases of occasional and necessary absence, or of sickness, any collector may exercise his powers and perform his duties by deputy, duly constituted under his hand and seal, and he shall be answerable for the acts of such deputy in the execution of such trust."

It will be noticed that here is a provision for the appointment of a discretionary number of deputy collectors who are declared to be Government officers.

With reference to surveyors, however, I find no such provision; on the other hand, section 2632 reads: "Every naval officer and surveyor, in cases of occasional and necessary absence, or of sickness, and not otherwise, may respectively exercise and perform his functions, powers, and duties by deputy, duly constituted under their hands and seals respectively, for whom, in the execution of their trust, they shall respectively be answerable."

This seems to limit the power to the appointment of a single deputy, and that for a special purpose. Sections 2630 and 2632 were both parts of the same act passed in 1799.

Section 2634 reads as follows: "The Secretary of the Treasury may, from time to time, except in cases otherwise provided, limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy of any such collector, naval officer, or surveyor."

It is noticeable that in this section the Secretary is given the power to limit and fix the *number* and compensation of

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clerks; but only the compensation, not the *number*, of deputies. No authority in this section, therefore, can be found for an increase in the number of deputy surveyors.

The legal status of the matter, then, seems to be, that of the three officers originally authorized to act by deputy, only one has been granted an increase in the number of deputies. Section 2722, it is true, uses the term "deputy surveyors" in the plural; but this is accounted for by the fact that the legislation is applicable to each of the different cities constituting a class. No implication, therefore, in favor of the power in question arises from the language of this section; on the other hand, I think section 2721 and section 2723 are of some significance as against the existence of such a power. Those sections read as follows:

Section 2721 "*The deputy surveyor at San Francisco shall receive a salary of three thousand dollars a year.*"

Section 2723. *The deputy surveyor at Savannah shall receive as salary not more than one thousand five hundred dollars a year.*"

The sole purpose of section 2722, in my judgment, was to fix the salary of the deputy in each of the cities named, but just as in section 2721 the salary of the deputy surveyor, evidently only one, at San Francisco is fixed at \$3,000, and in section 2723 the salary of the deputy surveyor at Savannah is fixed at not more than \$1,500.

It is true that the language of section 2746, which reads as follows: "An additional compensation of twenty-five per centum shall be continued to the appraisers (deputy collectors, deputy surveyors, and deputy naval officers), and weighers, at the port of San Francisco," seems to contemplate a plurality of deputy surveyors; but a reference to the original act, of which section 2746 is supposed to be the expression in the revision, shows that no such plurality is justified by the language of that act. I also observe that in an opinion by Attorney-General Devens (15 Opin., 356) he assumes that there may be more deputies than one, but he cites no statute to that effect, and I can find none.

My conclusion, therefore, is that there is statutory authority for the surveyor to have one, and only one, deputy at the

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same time, but that the Secretary may give to such surveyor such number of clerks as, in his judgment, the exigencies of the service may require.

I have the honor to be, very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

INSPECTORS OF STEAM-VESSELS.

An applicant for appointment as an inspector of boilers, under section 4415, Revised Statutes, should have not only the technical knowledge, but the actual professional experience of a practical engineer on a steam-vessel.

DEPARTMENT OF JUSTICE,

August 11, 1890.

SIR: I have the honor to acknowledge the receipt of your letter of July 30, asking an opinion on the construction of section 4415, Revised Statutes, relating to the method of selecting local inspectors of steam-vessels.

That section requires that the board selecting such inspectors shall, "when designating an inspector of boilers, select a person of good character and suitable qualifications and attainments to perform the services required of inspectors of boilers, who, from his knowledge and experience of the duties of an engineer employed in navigating vessels by steam, and also of the construction and use of boilers, and machinery and appurtenances therewith connected, is able to form a reliable opinion of the strength, form, workmanship, and suitableness of boilers and machinery to be employed without hazard to life, from imperfection in the material, workmanship, or arrangement of any part of such apparatus for steaming."

You ask, "Is it necessary that an applicant for appointment as a local inspector should have the actual experience in the manipulation of steam machinery of a professional engineer on a steam-boat or steam-ship?"

It seems to me that the language of the statute imperatively requires an affirmative answer. It says that the board shall select a person "who from his knowledge and *experience of the duties* of an engineer employed in navigating vessels

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by steam," etc., "is liable to form a reliable opinion of the strength, form, workmanship and suitableness of boilers and machinery," etc. How is he to obtain the knowledge and *experience* of the duties of an engineer, except by actual practice? It is clear to my mind that the law requires a man not only with the technical knowledge but with the actual professional experience of a practical engineer.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

NATIONAL BANKING ASSOCIATIONS.

The expenses of proceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association.

What would be a reasonable fee for the services of the district attorney depends upon the circumstances of the particular case.

DEPARTMENT OF JUSTICE,

August 11, 1890.

SIR: By your letter of August 1 you ask my opinion—

(1) As to whether it is the duty of a district attorney to institute proceedings for the forfeiture of the charter of a national bank which has incurred a liability to such forfeiture, without charge for his services against the assets of the bank.

(2) If the trust fund is chargeable for the services of the district attorney, what would be a reasonable fee?

Section 5239 reads as follows: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And

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in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

Section 380, Revised Statutes, reads as follows: "All suits and proceedings arising out of the provisions of the law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury."

In my opinion section 5239 does not contemplate that proceedings for forfeiture shall be commenced and a forfeiture decreed in every case in which the directors of a national banking association knowingly violate or knowingly permit any of its officers, agents, or servants of the association to violate the banking law. On the contrary, it seems to me that in the matter of instituting proceedings for a forfeiture on account of such violation, the Comptroller is invested with a discretion. In many cases such violations may occur, and still neither public policy nor private interests require the enforcement of the forfeiture. In such cases, such proceedings would involve a useless expense. In my opinion, it was the purpose of Congress, in this section, to leave the question whether such forfeiture should be enforced to the Comptroller, as a matter pertaining to the administration of the affairs of the bank.

Section 5238, Revised Statutes, reads as follows: "All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof."

The policy of this section seems to be that all expenses incurred in the administration of the affairs of the bank

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shall be paid out of the assets of the bank. As the charter was granted for the purpose of private gain, it would seem that the cost of the forfeiture, in case such forfeiture has been made necessary by the malfeasance of its officers, should be paid out of the funds of the bank. This would seem to be in harmony with the last-quoted section, which puts all expenses of any receivership and of all examinations into the condition of the bank upon the funds of the bank.

Moreover, the Government, as such, has no direct interest in the forfeiture of the charter of the bank. If it had, and if it were the purpose of this legislation to impose the expense of such forfeiture upon the Government as a public charge, it would have been more in accordance with propriety and usage that the proceeding to that end should be in the name of the United States, instead of the name of the Comptroller.

My conclusion, therefore, is that the expense of such proceeding for forfeiture should be paid out of the funds of the bank.

As to the second question, it is impossible to give an answer. Indeed, it is not a question of law at all, but a question of fact, depending upon the circumstances of each particular case.

Yours, truly,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

NORTH AND SOUTH DAKOTA LAND GRANT.

Under the provisions of section 14 of the act of February 22, 1889, chapter 150, the States of North Dakota and South Dakota take each seventy-two sections of land for university purposes.

Lands which were selected for the Territory of Dakota under the act of February 18, 1881, chapter 61, and which lie within the State of South Dakota, should be certified to that State.

DEPARTMENT OF JUSTICE,
August 11, 1890.

SIR: Your communication of August 4, relative to the construction of section 14 of the act of February 22, 1889,

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providing for the admission of the States of North Dakota, South Dakota, Montana, and Washington, is received.

In this communication you state two questions:

(1) "By this act is there a grant of seventy-two sections of land to the State of North Dakota and seventy-two sections to the State of South Dakota, or does each State take under the grant only thirty-six sections?"

(2) "Shall the lands which were selected for the Territory and which lie wholly within the State of South Dakota be certified by this office to that State, or shall they be certified to both North Dakota and South Dakota jointly?"

Section 14, so far as it pertains to this question, reads as follows:

"That the lands granted to the Territories of Dakota and Montana by the act of February 18, 1881, entitled 'An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming, for university purposes,' are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States, and any portion of said lands that may not have been selected by either of said Territories of Dakota or Montana may be selected by the respective States aforesaid, * * * and such quantity of the lands authorized by the fourth section of the act of July 17, 1854, to be reserved for university purposes in the Territory of Washington as, together with the lands confirmed to the vendees of the Territory by the act of March 14, 1864, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. * * *

"The section of land granted by the act of June 16, 1880, to the Territory of Dakota, for an asylum for the insane, will, upon the admission of said State of South Dakota into the Union, become the property of said State."

An examination of this entire act shows a purpose on the part of Congress, in making the grant of lands to the four new States, to place them upon an equality; that is, that each new State, counting what has already been granted, shall receive under this act such a quantity of lands, for the

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various purposes named, as will make the endowment for such purposes equal to that of each of the other new States.

It is true that the act of February 18, 1881 (21 Stat., 326), granted only seventy-two sections of lands to the entire Territory of Dakota; so that by a strict construction of the language of section 14, under consideration, "That the lands granted to the Territories of Dakota and Montana by the act of February 18, 1881, entitled 'An act to grant lands to Dakota, Montana, Idaho, and Wyoming, for university purposes,' are hereby vested in the States of North Dakota, South Dakota, and Montana, respectively," this would carry a title to only seventy-two sections of land for both of the Dakotas; but taking this in connection with what immediately follows, that the lands so granted "are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the Union, as provided in this act, *to the extent of the full quantity of seventy-two sections to each of said States*, and any portion of said lands that may not have been selected by either of said Territories of Dakota and Montana may be selected by the respective States aforesaid," leaves no doubt in my mind that it was the purpose of Congress that each of the States of North Dakota, South Dakota, and Montana should have the full seventy-two sections of land within its limits for university purposes. The act of 1889 enlarges the grant of the act of 1881 so as to give each of the two Dakotas seventy-two sections. This view is confirmed by the provision further along in the same section, which grants to the State of Washington such a quantity of land as, with what it has already received, makes an equal number of sections. This conclusion finds further confirmation in the organic acts of Idaho and Wyoming, whereby seventy-two sections of land are granted to each of those new States for the same purpose.

We ought not to impute to Congress a purpose to discriminate against North and South Dakota, unless the language used compels such conclusion. In my judgment such is not the legal effect of this legislation.

The answer to your first question, therefore, is that each of the Dakotas takes seventy-two instead of thirty-six sections.

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The second question I think is practically answered in the answer to the first. Congress was dealing with each of these proposed States as distinct and independent sovereignties. Never, so far as I know, in the history of the country, has a grant been made of this character jointly to two States. Such a grant would be not only without precedent, but would result in the greatest inconvenience. In my judgment, the proper construction of this section requires that the lands shall be certified to these States separately, and to each of lands only within its own boundaries.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

PAYMENT OF DRAWBACK ON EXPORTS.

Upon consideration of the provisions of section 3019 Revised Statutes, allowing a drawback on all articles wholly manufactured of imported materials on which duties have been paid: Advised that the person entitled to the drawback under that section is the exporter of the goods —i. e., the owner and shipper or consignor thereof to the foreign port—and he may collect it by his duly authorized agent.

Where the shipper acts only as the agent of the owner, the drawback belongs to the latter; and if the shipper is without authority from the owner to receive the drawback, it should be paid to the owner.

The power to make regulations for the ascertainment of the person to whom the drawback is payable, conferred upon the Secretary of the Treasury by said section, is a power to declare the rules of evidence upon which the Government officers will act in determining who that person is; and the only limitation upon it is that its exercise shall be reasonable.

It would be a reasonable regulation to declare that the shipper (the consignor in the bill of lading), in the absence of any evidence to the contrary, will be regarded as the owner or exporter of the goods and as entitled to the drawback.

DEPARTMENT OF JUSTICE,
September 1, 1890.

SIR: By letter of the 6th ultimo, addressed to the Attorney-General, you request a construction of section 3019 of the Revised Statutes. You state that under this section experience shows that there are several classes of persons who claim

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to be entitled to the drawback therein authorized to be paid, namely, the importer of the material, who has paid the duty thereon; the manufacturer of the article exported, in which such material is incorporated; the owner and shipper of the article, to whom the bill of lading has been issued; the holder of the bill of lading, to whom the same has been delivered after indorsement in blank; the holder of a copy of the bill of lading, upon which the shipper has indorsed authority to receive the drawback; and the person who makes the entry for export. You ask, first, to which of these classes of persons your Department should make payment of the drawback; second, whether, by virtue of section 3019 and section 3057, the Secretary of the Treasury has authority arbitrarily to determine, and by regulations to declare, to which of the classes payment of the drawback shall be made.

Before answering these questions, it is necessary, with reference to a subject-matter involving so many different interests, to limit the meaning of certain terms used in your letter as they are understood in the following discussion.

No doubt can arise in regard to the person described as importer or as manufacturer. The description, "owner and shipper of the article to whom the bill of lading has been issued," however, does need some limitation. The shipment for which the bill of lading has been issued must be understood to be a shipment under a contract for continuous carriage from some point in this country to some point in a foreign country, in the course of which export is obviously necessary. A shipment from an inland point to a border port, for reshipment there by new bill of lading, is not material here. The last shipment only is referred to in this discussion. The "owner" is understood to be the owner of the article just before final shipment. If the consignment is made by the vendor directly to the foreign vendee—a case of frequent occurrence—then by delivery to the carrier for shipment and export the title passes to the consignee, and strictly speaking the owner of the article "when exported" is the foreign consignee. But "owner," as used in your letter, is understood to be the owner of the goods who delivers them to the carrier for shipment and export—the vendor in the case just supposed—and is to be taken as equivalent to

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"shipper." Of course it may be that the bill of lading is made to the order of the consignor, in which case, as the consignor and consignee are the same person, the title does not change by the shipment, and no controversy can arise. But for clearness in discussion the subject must be treated as if each different interest involved were represented by a different person. The bill of lading is understood to be a foreign bill of lading, *i. e.*, evidence of a contract of continuous carriage to a foreign point. The indorsee of the bill of lading is understood to be the person who by virtue of such indorsement can demand the delivery of the goods to him by the carrier at their foreign destination. The copy of the bill of lading is understood to be a duplicate bill for custom-house purposes, indorsed by the shipper, with authority to the holder to collect the drawback. The person who makes the entry for export is understood to be the person who, as owner of the goods or on his behalf, signs the entry required, under the existing regulations of the Treasury, to be filed with the collector of the port six hours before the shipment of the goods, in order to give time for inspection by Government officers. (Customs Regulations, art. 967.)

Coming now to section 3019 Revised Statutes, its language is as follows :

"There shall be allowed on all articles wholly manufactured of materials imported on which duties have been paid when exported a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury."

The section, it will be observed, does not mention the person to whom the drawback is to be paid. This must be determined, therefore, by considering the intention of Congress in the enactment of the section, and the plan adopted to carry it out.

The manifest purpose of Congress was to foster the manufactures of this country by giving to the domestic manufacturer, in his competition in foreign markets, the benefit of free imported materials, and at the same time to prevent competition with such materials in the home market. To allow materials in the first instance to come in free of duty for this

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purpose would have required cumbersome and expensive Government inspection to prevent fraud. A drawback equal in amount to the original duty and payable at the time of export was, therefore, provided to operate as an inducement to this manufacture for foreign markets. The owner of the goods just before they were delivered for export, and who consigned and shipped them to a foreign port, was the one who ultimately decided that they were to be disposed of in a foreign market. His control over the goods ended when they were delivered for export to the carrier. The consignee's control began on their arrival at their foreign destination. The *transitus* was the export. The shipper was, therefore, the exporter, because he caused the export by putting them *in transitu*. It was upon his mind that a reward for exporting the goods would most effectively operate to that end. Of course, the drawback, to be effective, must operate as an inducement to the importer to import the materials, and to the manufacturer to manufacture them, as well as to the exporter to export them. To give the importer the drawback, however, after he had sold the materials to the manufacturer, would offer no special inducement to the manufacturer to manufacture them, or to the exporter to export them. Payment to the manufacturer would be equally ineffective with the exporter. On the other hand, payment to the exporter would directly induce the export, while it would justify both the manufacturer in asking of the exporter a better price for the manufactured article, and the importer in asking of the manufacturer a better price for the materials. In this way payment to the exporter would work a benefit to all three, and would be, therefore, an inducement to all of them to carry out the purpose of the statute.

The language of the section is very apt for the purpose of conforming the operation of the law to the foregoing considerations, which must have presented themselves to Congress when framing this law. The allowance is described as made on the articles themselves. The words "when exported," although not separated by a comma from the words immediately preceding, as they should be, necessarily qualify the verb "shall be allowed," and fix the allowance as of the time when the manufactured goods are exported. The right to

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the drawback is at first inchoate and contingent, attaching to the materials after they have come into the country, but ripens into an absolute right of present enjoyment upon their export in manufactured form. The owner of the goods, when the drawback ceases to be contingent and becomes absolute, would seem, therefore, to be the person to whom it is payable. The shipper—the exporter—is that owner, for the contingency ceases when the goods are delivered for export, and so he is entitled to the drawback. Thus the reason and the language of the section lead to the same result.

The right to drawback can not be said to accompany the goods after they are *in transitu* to a foreign port. As soon as it becomes absolute the beneficiary is fixed and the right becomes a chose in action, personal to the shipper, and no longer attached to the goods. The law plainly intended to reward the person causing the export, who is the shipper. To hold that the drawback follows the title to the goods to foreign shores is to give the section extra-territorial effect, and is to continue the regulation between the drawback and the goods after the object of creating the relation has been accomplished. Such a construction is therefore not reasonable.

It follows from the foregoing that the person entitled to the drawback, under section 3019 of the Revised Statutes, is the exporter, and that the exporter is the owner of the goods who intrusts them to a carrier, under a contract for delivery at a foreign port; in other words, the shipper, the consignor in the bill of lading.

Neither the importer as such, nor the manufacturer as such, is entitled to the drawback. The holder and indorsee of a foreign bill of lading, as such, is not entitled to the drawback. If the title to the goods thereby passes to him, it is the title to goods to be delivered at a foreign port, and potentially in a foreign manner. But, as has been said, the right to drawback is separated from the title to the goods the moment the goods are delivered for export and the bill of lading is issued. The transfer of the bill of lading, even though that transfer takes place in this country, therefore, gives the holder, as such, no right to the drawback.

The proper person to enter the goods for export is the shipper; for it is he whom the Government should recognize

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as entitled to make the entry. If such is not the practice, and another than the shipper makes the entry, then, as between their contending claims, the shipper is entitled to the drawback.

Whether the shipper may by a simple indorsement on a duplicate bill of lading authorize another person to receive the drawback on his behalf, or whether the authority must be executed in accordance with section 3477, Revised Statutes, is a question not distinctly raised in your letter, and which, until raised, need not be answered. It is sufficient to say that the owner and shipper to the foreign port, i. e., the exporter, may collect the drawback, and he may collect it by his duly authorized agent.

Coming now to the second question of your letter, it may be said that the Secretary of the Treasury, under section 3019, has the power by regulation to declare that the shipper of the article, by whom the foreign bill of lading has been issued, is the exporter and is the person to whom the drawback will be paid, in the absence of contending claimants.

It is conceivable that the shipper of the article may not be, in fact, the owner at the time of shipment, but acts only as the agent of the owner. In such case, of course, the drawback belongs to the real owner of the goods on whose account they were shipped, and if the shipper has no actual authority from the owner to receive the drawback, it would be the duty of the collector, upon notice of such want of authority, to pay it to the real owner. The power to make regulations for the ascertainment of the person to whom the drawback is payable, conferred by section 3019, is a power to declare the rules of evidence upon which the Government officers will act in determining who is the real owner of the goods when delivered for shipment and export. The only limitation upon such a power is that its exercise shall be reasonable. (*Campbell v. United States*, 107 U. S., 410.) Its exercise is certainly reasonable where the rules laid down are in accordance with the ordinary presumptions of the law of evidence. The shipper—the consignor in the bill of lading—is necessarily in possession of the goods up to the time of the consignment. The presumption of law from possession is ownership. It would be a reasonable regulation,

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therefore, for the Secretary to declare that the shipper—that is, the consignor in the bill of lading—in the absence of any evidence to the contrary, will be regarded by the Government as the owner of the goods—as the exporter—and as entitled to the drawback. If, before the drawback is paid, a claimant appears as the real owner of the goods, in opposition to the person in whose name, as consignor, they are shipped, then it would be the duty of the collector to decide, on the evidence adduced, the merits of the claim in accordance with the foregoing construction of section 3019. If such a claim is made subsequent to payment of the drawback to the shipper, in accordance with the suggested regulation, the claimant will be estopped by the apparent title to the drawback with which under such regulation he must be held to have clothed the shipper.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

OFFENSES COMMITTED ON THE HIGH SEAS.

No constitutional objection is perceived to a provision in the proposed consular convention between the United States and Great Britain, conferring upon the courts of each country jurisdiction of offenses committed on vessels of the other on the high seas.

DEPARTMENT OF JUSTICE,
September 4, 1890.

SIR: I have the honor to acknowledge the receipt of your letter of the 29th ultimo, in reference to the provision in a proposed consular convention between the United States of America and Great Britain.

You say: "The precise point intended to be stated in the Department's letter of the 24th ultimo is whether it would be competent for Congress to confer upon the courts of the United States jurisdiction of offenses committed on British vessels on the high seas. The proposal made by Great Britain for a

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convention in 1883 has been renewed with the provision, contained in the draft convention of that year, for the assumption by the courts of each country of jurisdiction of offenses committed on the vessels of the other on the high seas. It is in respect to this particular provision, again put forward by the British Government, that the Department has been led to entertain doubts on constitutional grounds."

The question proposed is still quite indefinite, because it is not known what particular form a treaty and legislation with a view to the end proposed might take. At the same time I am free to say that no reason occurs to me now why such treaty and legislation might not be valid. It is not uncommon for one nation to cede to another jurisdiction within its territorial limits for certain purposes, such as for coaling stations, etc. It is also quite common, by treaty, for one nation to concede to another jurisdiction of offenses committed within the boundaries of the nation making such cession; as, for instance, offenses committed upon the decks of foreign ships in port. The United States have made concessions of this character. (See *Wildenshaus' Case*, 12 U. S. R., 1.)

So it is common for one nation to grant another rights of transit across its territory. Congress has just passed a law giving to the Federal courts sitting upon the Great Lakes jurisdiction over offenses committed upon vessels registered or enrolled under the laws of the United States, *at any point* upon the Great Lakes and their connecting waters. It was settled as long ago as the purchase of Louisiana that the United States Government might by treaty acquire territory from a foreign nation. If it may acquire the title and supreme control over territory, I see no reason why it may not acquire limited rights in foreign territory which may be reasonably necessary for the general welfare.

All of these suggestions, which are made without much examination, because I do not think the question is one calling for a formal opinion, point to the conclusion indicated in the beginning, that such legislation as you suggest might be valid.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF STATE.

Refund of Moneys Exacted by Customs Officers.

REFUND OF MONEYS EXACTED BY CUSTOMS OFFICERS.

Moneys improperly exacted from and paid by vessels proceeding under section 29 of the act of June 26, 1884, chapter 121, to unload at places other than a port of entry, may be refunded by the Secretary of the Treasury, without formal protest by the applicant, in cases where application has been made within one year from such payment.

DEPARTMENT OF JUSTICE,

September 10, 1890.

SIR: Your communication of July 7th, with application of owners and consignees for the refunding of moneys paid as salaries to officers of the customs while they were superintending the unloading of vessels in the collection district of San Francisco at places other than the port of entry, has been received and duly considered.

By section 29 of the shipping act of June 26, 1884, it is provided "that vessels arriving at a port of entry * * * may proceed to places within that collection district * * * under the superintendence of customs officers, at the expense of the parties interested," for the purpose of unloading.

It appears that it was the practice in the collection district of San Francisco to exact, from vessels proceeding to unload at places other than the port of entry, a deposit sufficient to cover the salaries for the time being, as well as the incidental and personal expenses, of the officers detailed to superintend this unloading. By a decision of the Treasury Department, made April 22, 1890 (Syn. 9982), it is held that the expenses of the customs officers intended to be paid do not include the pay of the officers, but only their personal expenses.

Upon the receipt of this decision the exaction as to salaries ceased.

By the opinion of Acting Attorney-General Phillips, dated September 19, 1884, it is held that the omission in section 26 of the provision to require a protest by the applicant as a foundation for the refund is deliberate, and that no such protest is necessary. This opinion has been formally acquiesced in by the Treasury Department (Decision No. 6721).

Although section 2032, Revised Statutes, if considered

Refund of Moneys Exacted by Customs Officers.

alone, might preclude the refunding of the moneys claimed, without formal protest and appeal, it is deemed proper to consider that section not only as modified by section 3013, but as subjected to an exception created by section 26 of the shipping act.

This application for refunding is considered as limited to cases falling under said section 26, which provides "that whenever any * * * exaction has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same, the Secretary of the Treasury," as provided, shall have power to refund so much thereof as he may think proper.

The decisions above referred to, and now accepted, render the conclusion necessary that the charges complained of were improperly imposed.

The opinion given by the Attorney-General under date of June 12, 1885, has been considered in this connection. That opinion relates to tonnage duties, and is not understood to cover the question now under consideration.

In response to the inquiry presented, I answer that it seems to be clear that the Secretary of the Treasury is authorized to repay the moneys received from consignees and owners of vessels, in so far as such moneys covered salaries of the discharging officers, in cases where applications have been made for the refunding of the same within one year from such payment.

I return herewith the papers which accompanied your letter.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

Inspectors of Steam-vessels.

INSPECTORS OF STEAM VESSELS.

The notice for convening the "board of designators," provided for in section 4415, Revised Statutes, should be such as to give each member a reasonable time to be present at the meeting and a knowledge of its object; and though such notice is not required by the statute to be in writing, it would be advisable to require written notice by regulation.

The members should meet together as a board, organize as a board, and act as a board, in making the designation to fill the vacant or new inspectorship.

DEPARTMENT OF JUSTICE,

September 16, 1890.

SIR: By letter of the 9th instant you ask an opinion upon the construction of section 4415 of the Revised Statutes by an answer to the following questions:

"First. Must the notification of the supervising inspector to the collector and district court judge convening the board of designators, provided in said section, be formal and in writing?

"Second. Must the board, when notified, actually meet together and organize as a board, to make a designation legal; or may the supervising inspector without previous notice call on and confer with the collector of customs at his office or residence, and agree with him as to the candidate, and then upon the district judge at his residence or place of business in the same or another city, and so agree upon a candidate for designation, thus in each case having a majority of the board at a meeting, but of different personality, excepting the supervising inspector himself?"

The part of the section referred to in these questions is as follows:

"Whenever any vacancy occurs in any local board of inspectors, or whenever local inspectors are to be appointed for a new district, the supervising inspectors shall notify the collector, or other chief officers of the customs of the district, and the judge of the district court for the district in which such appointment is to be made, who, together with the supervising inspector, shall meet together as a board of designators, and fill the vacant or new inspectorship."

The answer to your first question is that the notice for con-

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venering the board of designators, to the persons who by law are required to act as members thereof, should be such as to give each one a reasonable time to be present at the meeting, and a knowledge of its object. The fact that such notice is not in writing would not invalidate the proceedings of the meeting; but it would be much better, it seems to me, by regulation to require written notice.

The answer to your second inquiry is that the law requires the persons designated in the section to meet together as a board, and to take action as such. The action of the board is presumed to be and should be the result of joint consultation between its members. Joint consultation as a board can not be had without a meeting of the board, of which all the members shall have received legal notice. The members of the board should organize as a board and should act as a board. The informal conferences between different members of the board, without previous notice, when the members of the board taking part are not all present at the same time, is not a meeting of the board, and is not a compliance with the statute.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ALTERATION OF ENGINEER'S LICENSE.

The alteration of a license issued under section 4441, Revised Statutes, is not an offense within sections 5418, 5479, or 5423, Revised Statutes. Revocation of the license, under section 4450, Revised Statutes, seems to be the only punishment provided by law for such case.

DEPARTMENT OF JUSTICE,
September 17, 1890.

SIR: Answering your letter of the 13th instant, in which you ask whether the alteration of a license to an engineer, issued under section 4441 of the Revised Statutes, so as to give the licensee the appearance of a higher class than that for which the license was actually issued, is a forging of a public

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record for the purpose of defrauding the United States, under section 5418 or section 5479 of the Revised Statutes, I have the honor to say that in my opinion such alteration is not within the sections mentioned, nor within section 5423, the crime described in which is more closely allied to the misconduct stated in your letter. So far as I have been able to investigate the statutes, the only possible punishment provided by law is the revocation of the license under section 4450. I agree with you that the importance of the subject demands that Congress should be asked to supply the omission in the statutes, and provide a punishment for such misconduct.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

USE OF TELEGRAPH IN THE POSTAL SERVICE.

The Post-Office Department has no power, under existing laws, to make contracts for the transmission of intelligence by telegraph, for the general public, as a part or branch of the postal service.

Mail matter, as defined by statute, does not include telegraphic correspondence, as such; nor does the power given the Postmaster-General to contract for carrying the mail include authority to contract for sending messages by telegraph for the benefit of the people at large.

DEPARTMENT OF JUSTICE,
September 20, 1890.

SIR: The question presented by your communication of the 4th instant, as to whether the Post-Office Department has the power, under existing laws, to make contracts with telegraph companies for the transmission of messages after the manner in which contracts are now made by the Department with transportation companies for carrying the mails, has been examined, and the following answer is respectfully submitted:

It appears that in organizing the postal service of the country the purposes of the legislators were expressed in very comprehensive terms. It was stated that the post-office

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under the confederation in 1775 was, in terms, established "for conveying letters and intelligence through this continent;" and the purpose is further indicated by the resolution passed May 29, 1775, providing "that ways and means should be devised for the speedy and secure conveyance of intelligence from one end of the continent to the other," and appointing "a committee to consider the best means of establishing post for conveying letters and intelligence through this continent."

The ordinance regulating the post-office, passed October 18, 1782, is grounded upon a preamble presenting similar views of the objects to be attained by the postal organization, and recites as follows:

"Whereas the communication of intelligence with regularity and dispatch from one part to another of these United States is essentially requisite to the safety as well as the commercial interest thereof," etc.

It is fair to infer that the makers of the Constitution, intending to "promote the general welfare," when granting to Congress the power "to establish post-offices and post-roads" and "to regulate commerce," and to make all laws necessary and proper for carrying into execution the powers vested in the Government or in any department or officer thereof, had in mind the comprehensive view which regarded post-offices and post-roads as instruments for the transmission of intelligence, and that such transmission was the purpose of the grant of power.

The facts are well known that by act of March 3, 1843, the sum of \$30,000 was appropriated by Congress for testing the capacity and usefulness of the telegraph for the use of the Government, and that in pursuance of this legislative act the pioneer line of the new system of transmitting intelligence was constructed and put in operation between Washington and Baltimore, and that by a clause in the civil and diplomatic appropriation bill, passed March 3, 1845, the sum of \$8,000 was provided to meet the expense of this telegraph for the year ending February 1, 1846, the said sum to be disbursed under the direction and superintendence of the Postmaster-General.

Under this legislation the telegraph was transferred to the

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Post-Office Department, and regulations were adopted to bring it into constant service as a means of transmitting intelligence accessible to all; rates of postage were prescribed and paid upon dispatches transmitted, and the same were delivered, as occasion required, by the penny post.

Thus it appears that the comprehensive idea of "general transmission of intelligence" in connection with the post office, expressed in 1775, was, under the authority of Congress, applied to and employed in connection with the telegraph by the Post-Office Department in 1845-'46.

The Government failed to continue appropriations for operating the new system of communication under its department and the transmission of correspondence by telegraph was allowed to be conducted by others.

In 1877, in the case of *Pensacola Telegraph Company vs. Western Union Telegraph Company* (96 U. S. R., 1), Mr. Chief-Justice Waite, in delivering the opinion of the court, says: "Post-offices and post-roads are established to facilitate the transmission of intelligence."

The fact of governmental aid to telegraph companies in granting rights of way over public lands, and military and post-roads, and across navigable streams, in grants of timber and other material, in subsidies, and in other legislative assistance, may properly be considered in this connection.

It is manifest that the object of the establishment of postal facilities was the transmission of intelligence for the uses and benefit of the people at large. This purpose was primary and creative, and the methods of communication were subordinate and subject to opportunity and convenience.

When Congress was authorized to establish post-offices and post-roads it was authorized to establish and control such facilities as should be found valuable to the public for the general transmission of intelligence. The purpose of the grant, by implication, extends the authority granted so as to include all facilities of value in accomplishing such purpose.

Provision for transmitting telegrams, placing them in postal custody and conveying and delivering them according to the address, may be held to constitute the communication

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transmitted by wire correspondence, and the message, mail matter.

But no statute is found which authorizes the Post-Office Department to employ or establish telegraphic appliances for the general transmission of correspondence.

Were electrical communications a new discovery placed before the Government for adoption under its postal Department as an additional means of transmitting intelligence, to be developed and employed by the Department, the question of the power of the Department would be presented in a different light.

But when the history of the development of our telegraphic system is recalled, when it is remembered that the use of the telegraph as employed by the Postmaster-General in 1845-'46 under authority of Congress was discontinued because Congress made no provision for its further use, when we consider the number, variety, and importance of the communications transmitted by its use, and when it is taken into account that private persons and corporations have been allowed for a long period to develop, extend, and control this instrumentality, the conclusion seems to be beyond argument that Congress, in clothing the Department with its existing powers, can not be held to have granted, without specifying it, the power to provide for a telegraphic system of correspondence for the public at large.

Subdivision 7 of section 9, of the Constitution, declares that "No money shall be drawn from the Treasury but in consequence of appropriations made by law."

Sections 3679 and 3732, Revised Statutes, are as follows:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations.

"SEC. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation,

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which, however, shall not exceed the necessities of the current year."

No special provisions relating to the Post-Office Department are known to exist that will except the power in question from the general rule established by the law cited.

No law that specifically or by natural inference authorizes the making of the contract is found.

The first clause of section 3732 applies to direct authority to contract granted by statute; the second clause covers an implied authority arising out of the appropriation of means to fulfill. The two sections cited are held to be construed together. If public moneys are involved an appropriation may give power to contract. If public moneys are not involved the Department is prohibited from making the contract "unless the same is authorized by law."

In 9 Opinions, 18, Mr. Attorney-General Black, considering the latter statute in discussing executive contracts, says: "The meaning of the provision is very plain. It declares that the Department shall have power to bind the Government by contract only in two cases: (1) where the contract is expressly authorized by law; (2) where there is an appropriation already made large enough to fulfill it. * * * This statute ought to be so construed as to carry out its wise and beneficial object. I incline, therefore, to think that a contract made in violation of it is utterly void. * * * Certainly, if it be made without a law and without any appropriation, the contractor can take nothing by it."

In the Floyd acceptances (7 Wall., 666) the court say: "Our statute books are filled with acts authorizing the making of contracts with the Government through its various officers and departments, but in every instance the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law."

Mr. Attorney-General Devens (15 Opin., 240) says: "In order that a contract should be authorized by law it must appear either that express authority was given to make such contract, or that it was necessarily to be inferred from some duty imposed upon, or from some authority given to, the person assuming to contract on behalf of the United States."

Collection of Customs Duties.

Mail matter, as defined by statute, does not include telegraphic correspondence as such.

The authority given by statute to the Postmaster-General for contracting for carrying the mail does not include the sending of messages by telegraph.

Telegraphic correspondence under the management of the Post Office Department, for the general public, has not been carried on since 1846, and the law authorizing that use gave no authority for contracting for a general public service.

However desirable and important the end in view may be, it would seem to be an unauthorized exercise of the executive power, therefore, to provide for and take charge of a portion of the telegraphic service and make the same an adjunct of the postal service under a contract to be made with the companies concerned, because it would be without statutory authority, and thus in contravention of the inhibition of section 3732.

Although it were made clear that the Government would receive more money than it would pay out, thus profiting by the connection while affording valuable additional facilities of correspondence to the people, yet the comprehensive prohibition of section 3732 would still render the contract void.

I am, therefore, of the opinion that the Post Office Department has no power under existing laws to make the contracts in question.

Very respectfully,

WM. H. TAFT,
Acting Attorney-General.

The POSTMASTER-GENERAL.

COLLECTION OF CUSTOMS DUTIES.

The statement of the manufacturer of merchandise consigned by him or on his account for sale in the United States, declaring the cost of the production of such merchandise, which is required by section 8 of the act of June 10, 1890, chapter 407, entitled "An act to simplify the laws in relation to the collection of the revenue," to be presented to the collector at the time of the entry of the merchandise, should be signed by the manufacturer himself. The signing of such statement by an agent is insufficient.

Collection of Customs Duties.

It is not necessary for the manufacturer to appear in person before the proper consular officer and sign the statement in his presence, in order that it may receive the attestation of such officer, as required by the same section. Should the consular officer certify that it has been satisfactorily shown to him that the statement is, as it purports to be, the act of the manufacturer, this would be an attestation of the statement, and meet the requirement of the statute.

DEPARTMENT OF JUSTICE,

September 23, 1890.

SIR: Your communication of September 8, instant, submits for opinion the question, "whether, under section 8 of the act of June 10, 1890, entitled 'An act to simplify the laws in relation to the collection of the revenue,' the statement of the manufacturer of merchandise consigned for sale in the United States must be signed by the manufacturer in person, or whether it may be signed by his agent, who is authorized under section 3 of the same act to sign the declaration on the invoice required by said section 3."

Section 8 is as follows:

"That when merchandise entered for customs duty has been consigned for sale by or on account of the manufacturer thereof, to a person, agent, partner, or consignee in the United States, such person, agent, partner, or consignee shall, at the time of the entry of such merchandise, present to the collector of customs at the port where such entry is made, as a part of such entry, and in addition to the certified invoice or statement in the form of an invoice required by law, a statement signed by such manufacturer, declaring the cost of production of such merchandise, such cost to include all the elements of cost, as stated in section eleven of this act. When merchandise entered for customs duty has been consigned for sale by or on account of a person other than the manufacturer of such merchandise, to a person, agent, partner, or consignee in the United States, such person, agent, partner, or consignee shall, at the time of the entry of such merchandise, present to the collector of customs at the port where such entry is made, as a part of such entry, a statement signed by the consignor thereof, declaring that the merchandise was actually purchased by him, or for his account, and showing the time when, the place where, and from whom

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he purchased the merchandise, and in detail the price he paid for the same: *Provided*, That the statements required by this section shall be made in triplicate, and shall bear the attestation of the consular officer of the United States resident within the consular district wherein the merchandise was manufactured, if consigned by the manufacturer or for his account, or from whence it was imported when consigned by a person other than the manufacturer, one copy thereof to be delivered to the person making the statement, one copy to be transmitted with the triplicate invoice of the merchandise to the collector of the port in the United States to which the merchandise is consigned, and the remaining copy to be filed in the consulate."

Looking at other sections of the law, which also regulate the entry of imported merchandise, we find that what is required in them to be done may be performed indifferently by the owner of the merchandise imported or any other person representing him. Thus the invoice on which entry is made may be signed by the owner or his agent (sec. 2); the declaration required to be made on the invoice before shipment of the merchandise therein described may be signed "by the purchaser, manufacturer, owner, or agent" (sec. 3); the affidavit required to show the impracticability of producing an invoice, as required by law, may be made "by the owner, importer, or consignee," and "the owner, importer, consignee, or agent" desiring to make entry in such cases may depose to the facts necessary to be established before entry without invoice can be permitted (sec. 4); the declaration required to be made at the time of entry on invoice may be made by the "owner, importer, consignee, or agent" (sec. 5); and the addition allowed to be made to the invoice value of merchandise acquired by purchase, in order to raise it to the market value or actual wholesale price of the merchandise at the time of exportation, may be made by the "owner, consignee, or agent" (sec. 7).

Congress having been thus particular to say in these sections that what is therein required may be done by an agent, I do not think it would be proper to imply that Congress meant that the statement required by section 8 to be made by the manufacturer or other owner of merchandise con-

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signed to this country may be made just as well by his agent. The fact that Congress does not say that such statement may be made by an agent appears quite conclusive that it did not intend to authorize a statement so made. It is hardly possible that Congress would have left to implication in this section a matter about which, as we have seen, it is explicit in the other sections regulating the entry of imported merchandise, and, I think, the law itself is its own best interpreter, in this particular.

This view is strongly confirmed by what the Committee on Ways and Means say of section 8 in reporting the bill to the House, namely :

"Section 8 is new, and is intended to furnish appraising officers with additional means of ascertaining the value of goods consigned for sale on foreign account, in appraisement of which the customs officers find the greatest difficulty. It is believed that this section, together with other provisions of the bill, will tend to discourage undervaluations."

Does it not seem clear, then, that to allow the statement of an agent to be a compliance with section 8 would frustrate the intention, as declared by the committee, to establish a *new* protection against the evil of undervaluation by requiring original evidence as to value from the manufacturer or other owner himself, and not merely the evidence of agents or consignees, as heretofore?

I do not think this interpretation of the law will produce the inconvenience mentioned in the letter of the Assistant Secretary of State, inclosed in your letter, of compelling the manufacturer, living at a distance from the place where the consulate is located, to go there to make his statement.

It is true section 8 provides that the manufacturer's statement "shall bear the attestation of the consular officer of the United States resident within the consular district wherein the merchandise was manufactured," * * * but I do not perceive that this necessarily requires that the manufacturer shall appear in person before the consular officer and sign the statement.

Undoubtedly it would be an "attestation" of the statement, within the meaning of the law, if the consular officer should append to a certificate that it was signed and ac-

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knowledged by the manufacturer in his presence. But, in my judgment, it would be also an "attestation" of the statement if the consular officer should certify that it had been satisfactorily shown to him that the statement was, as it purports to be, the act of the manufacturer or other owner. This must be so, if we accept as authority one of the definitions of "attestation" given by Webster and adopted by the English Imperial Dictionary, namely, that it is "a solemn or official declaration, verbal or written, in support of a fact."

I do not understand that, according to this definition, the person making this "solemn or official declaration" must have had original knowledge of what the declaration contains. Indeed, we know that in many cases such declarations are not made on original knowledge, as, for instance, where the governor of a State certifies that a land-grant road has been built in accordance with the grant, or a consular officer certifies to the identity of persons acknowledging instruments before him.

Indeed, the consular regulations require consuls to record bills of sale of ships in their offices, and "authorize their execution" by a certificate, which is, of course, founded on the testimony of witnesses who depose to the genuineness of the instrument authenticated. (Consular Regulations, pages 106, 582, ed. 1888.) And where the Secretary of State of the United States attests the correctness of a copy of an act of Congress, no one supposes that the officer has, himself, compared the copy with the original, and so certifies to what is within his knowledge.

If we deny to "attestation" this further sense we go far towards making of little or no practical value the provision of section 3 of the act which authorizes the manufacturer's agent to make the declaration on the invoice required by that section; because, if the owner must appear before the consul to make the statement called for by section 8, he might as well, and no doubt would, in most cases, make the declaration on the invoice at the same time, himself, and not through an agent. But if we hold that the consul may make the attestation required by section 8 without having the manufacturer before him, we at the same time allow section 3 to have a practical beneficial effect, in the above particular, and

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conform to the well-known rule which prefers the construction that permits all parts of a statute to have due operation. Again, if we hold that there is no compliance with section 8 unless the manufacturer, consigning goods to this country for sale, makes the required statement before the proper consular officer in person, it seems to me that we cause the law, which has in view the double end of revenue and protection, to operate to the detriment of the revenue by making it unnecessarily burdensome to manufacturers to seek markets in this country. I therefore think it my duty to give section 8 that meaning which does not involve detriment to the public good, and so to avoid imputing to Congress, on certain grounds, the intention to produce a public inconvenience. In short, in my opinion, the word "attestation" is used in this section in the sense of authentication of the whole instrument and not merely of the signature.

It results, then, in my opinion, the manufacturer is not required to make or sign the statement called for by section 8 in the presence of the consul, and is entitled to have his statement authenticated by the consular attestation when it is made to appear to the satisfaction of that officer that the statement is in fact the act of the person whose act it purports to be.

I have the honor to be, sir, your obedient servant,
W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

REFUND OF HEAD TAX AND TONNAGE TAX.

Where a claim was made for a refund of "head tax" alleged to have been illegally exacted in August, 1890, by the collector at Baltimore in the case of the steamship *Russia*, under the provisions of the act of August 3, 1882, chapter 376: *Advised*, that the Secretary of the Treasury is authorized by section 26 of the act of June 26, 1884, chapter 121, to refund the head tax thus exacted, or so much thereof as he may think proper, if, on investigation, he finds that the same was illegally, improperly, or excessively imposed.

And where a claim was made for a refund of "tonnage tax" alleged to have been illegally exacted from the steamer *Cuba* in August, 1890, by the collector at Philadelphia: *Advised, also*, that the Secretary of the Treasury may, under said section 26, refund such tonnage tax if he

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finds that it was illegally, improperly, or excessively imposed, and in case the Commissioner of Navigation shall have first decided, under section 3 of the act of July 5, 1884, chapter 221, that such tax was erroneously or illegally exacted.

DEPARTMENT OF JUSTICE,
September 26, 1890.

SIR: Your communication of the 18th instant is before me. You state that a claim has been presented to the Treasury Department "for a refund of certain 'head tax' illegally levied by the collector of customs at Baltimore, Md., August 9, 1890, in the case of the steamship *Russia*, under the provisions of the 'Act to regulate,' etc., approved August 3, 1882, and that a claim is also made for a refund of certain tonnage tax illegally imposed August 4, 1890, by the collector of customs at Philadelphia, Pa., on the steamer *Cuba*.

"Referring to the provisions of sections 14, 24, and 29 of the act of June 10, 1890, 'to simplify,' etc., I will thank you to state whether in your opinion the provisions of section 26 of the act of June 26, 1884, 'to remove,' etc., authorize the Secretary of the Treasury to refund such dues and tax, if, on investigation, he finds that they were 'illegally, improperly, or excessively imposed,' and if the Commissioner of Navigation shall have first decided, under section 3, act of July 5, 1884, in the case of any such tonnage tax, that it was erroneously or illegally exacted."

In relation to the matter first referred to, I beg to answer that the duty to be paid for immigrant passengers under the act of August 3, 1882 (22 Stat., 214), is to be paid by the owner, agent, or consignee of the vessel, and is made a lien upon the vessel as well as a debt against the owner thereof. The moneys collected constitute the immigrant fund, and the disposition thereof has no relation to imported merchandise, or to customs duties or the collection thereof.

This "head tax" is not subject to the provisions of the act of June 10, 1890, any further than it may be affected by the repeals contained in section 29. Neither section 14 nor section 24 covers or includes this duty.

Section 14 of the act 1890 provides "that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and

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charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall * * * give notice in writing," etc.

This phraseology, separately considered, might be understood to include head taxes and the like, but an examination of the several provisions of the act precludes such a conclusion. The purpose of the customs administrative act is to simplify the collection of duties levied upon imported merchandise, to secure uniform appraisement, and to establish plain and comprehensive methods of reappraisement, review, and appeal, in connection with such collection.

The scope of the act is practically confined to dutiable merchandise and to the duties placed thereon by statute and the costs, charges, fees, and exactions which are connected therewith and which go to make up the moneys to be paid by the importer (or consignee) as such, upon merchandise coming to him through the custom house.

The introductory and limiting words of the first five sections of the act, respectively, limit the provisions of those sections to imported merchandise, and the same may be said of sections 7, 8, and 9.

Under section 12 the general appraisers are to perform general duties and "such other supervision over appraisement and classifications, for duty, of imported merchandise as may be needful," etc.

Section 13 is devoted to "merchandise and the dutiable costs and charges thereon."

The provisions comprised in section 15 for review by the circuit court, and by the Supreme Court, do not reach beyond imported merchandise, the classification thereof, and the rate of duty imposed thereon under such classification; and section 25 is plainly upon the same theory.

Nothing appears in the act to controvert the conclusion that its general purpose is limited to merchandise, the duties thereon, and the costs, charges, fees, and exactions paid thereon by the importer as such.

The noting of the exclusion of duties on tonnage in section

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14 is indicative of caution to avoid exactions not connected with customs or their collection, rather than of any purpose to include under said section charges of the nature of the immigrant tax.

As sections 2932 and 3013 of the Revised Statutes were repealed before the date of the exaction under consideration, it does not appear that any power to refund the money illegally exacted exists, except under section 26 of the act of June 26, 1884. (23 Stat., 59.) Assuming that this money was illegally levied and is unlawfully withheld from the rightful owner, a construction that will do justice should be adopted if it can be done in accordance with existing statutes.

It can hardly be argued that Congress intended to provide that the Government should keep moneys not belonging to it by law, and leave those who have been injured by the erroneous and unauthorized exactions of its officials without a remedy. As the language of said section 26 properly admits of such a construction, it is fair to infer that in enacting the repealing clauses of section 29 of the act of June 10, 1890, Congress contemplated that the proper refund of "head tax" improperly exacted and paid might be made under section 26 of the shipping act.

Accepting this view, I submit the opinion that the Secretary of the Treasury is authorized to refund the head tax levied in the case of the steamship *Russia*, or so much thereof as he may think proper, if on investigation he finds that the exaction thereof was illegally, improperly, or excessively imposed.

Second. In relation to the tonnage tax imposed August 4, 1890, upon the steamer *Cuba*, I answer that section 14 of the act of June 10, 1890, expressly excepts duties on tonnage from its operation, and section 21 relates to a rule of evidence only.

The views above expressed, as to the scope, purpose, and construction of the act, apply with equal force to the proposition to refund tonnage duties under said act.

Section 24, in providing for a refund of overpayment of "unascertained or estimated duties or payments made upon appeal," does not provide for a refund of tonnage tax.

The "unascertained or estimated duties" intended are du-

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ties levied upon merchandise, the precise amount of which had not been determined.

"Payments made upon appeal" are payments made upon the appeals authorized under sections 14 and 15 of the act, and referred to in section 25 thereof, and can not be held to cover head tax or tonnage tax; consequently, although section 29 of the act repeals sections 2931, 2932, 3012 $\frac{1}{2}$, and 3013 of the Revised Statutes, said act makes no provision for the repayment of a tonnage tax improperly or illegally exacted.

It is submitted that the concluding portion of section 24, which provided for a detailed statement of moneys refunded by the Secretary of the Treasury under "the provisions of this act or of any other act of Congress relating to the revenue" may have been intended to include section 26 of the shipping act.

The tonnage duty has been held to be a charge upon the vessel itself. Under act of July 5, 1884 (23 Stat. 119), the Commissioner of Navigation has general superintendence of the commercial marine.

Section 3 of said act reads as follows:

"That the Commissioner of Navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

The acting Attorney-General, under date of September 2, 1884, advises the refund under section 26 of the shipping act of a tonnage tax illegally assessed against the *Bessie May*. In an opinion dated the 19th of said month (18 Opin. 63) he confirms and elaborates the same views, and the Department refunded such tonnage dues.

The Attorney-General in an opinion dated June 12, 1885 (18 Opin. 197), seems to question the construction accepted in the *Bessie May* case, but makes no reference to the opinions given in relation thereto. He holds, however, that the decision of the Commissioner of Navigation is made final

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"as to all questions relating to the refund of the tonnage tax when erroneously or illegally collected."

As Congress has by section 29 repealed those sections of the Revised Statutes above noted without providing for the refund of a tonnage tax illegally and improperly exacted, it may be concluded that Congress intended to leave the question of the refund of the tax so exacted to the final decision of the Commissioner of Navigation, under section 3 of the navigation act, and the payment thereof to the Secretary of the Treasury under section 26 of the shipping act, in case he shall think proper to make such refund.

While this construction is not so necessary and unanswerable as to preclude question, it is, in my judgment, fairly warranted by the language of these sections.

I am of the opinion that the provisions of section 26 of the act of June 26, 1884, authorize the Secretary of the Treasury to repay the tonnage tax imposed on the steamer *Cuba*, if, on investigation, he finds that it was "illegally, improperly, or excessively imposed," and if the Commissioner of Navigation shall have first decided under section 3, act of July 5, 1884, that such tax was erroneously or illegally exacted.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

APPRAISEMENT OF DUTIABLE MERCHANDISE.

Where, at the instance of the importer, a reappraisal of certain items of the invoice by the general appraiser was ordered under the provisions of section 13 of the act of June 10, 1890, chapter 407, entitled "An act to simplify the laws in relation to the collection of the revenue," and the importer being dissatisfied with the reappraisal of such items thereupon made, the matter was referred to a board of three general appraisers, under the provisions of the same section, who not only reappraised the items on which the appeal to them was taken, but reappraised and advanced in value other items of the invoice as to which there was no appeal: Held that, under said section, it was not within the competency of the board of general appraisers to pass upon any items which were not embraced in the case submitted for their examination and decision, and that the board should have confined itself to those items only which were covered by the importer's appeal.

Appraisement of Dutiable Merchandise.

DEPARTMENT OF JUSTICE,
September 27, 1890.

SIR: Your communication of September 13, instant, and the inclosures therein referred to, present the following case:

One Assad Munyer imported a number of packages of merchandise into the port of New York by the steamer *La Bretagne*. At the importer's instance, a reappraisal by the general appraiser in charge was ordered on the ground that certain items of the invoice were improperly advanced in value. The importer being dissatisfied with the reappraisal of these items thus made, the matter was referred to the board of three general appraisers, who not only reappraised the items on which the appeal to them was taken, but reappraised and advanced in value *other items as to which the importer did not appeal*.

It appears, furthermore, by the letter of the special deputy collector of the port of New York, that your request for an opinion as to the propriety of the action of the board of general appraisers in reappraising items on which the importer did not appeal to them is at the suggestion of the board of appraisers.

The question for solution turns on the meaning of section 13 of the act of June 10, 1890, entitled "An act to simplify the law in relation to the collection of the revenue."

That section provides that if the collector "shall deem the appraisement of any imported merchandise too low he may order a reappraisement, which shall be made by one of the general appraisers," or that "if the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the *appraisement thereof* * * * he may, within two days thereafter, give notice to the collector, in writing, of such dissatisfaction, on receipt of which the collector shall at once direct a reappraisement of *such merchandise* by one of the general appraisers." It then provides that the decision of such appraiser "shall be final and conclusive as to the dutiable value of *such merchandise*," unless "the importer, owner, consignee, or agent of the *merchandise*," or the collector, shall be dissatisfied with such decision, in which case provision is made for the transmission by the collector of the

Exclusion from the Mails.

invoice and all papers appertaining thereto to the board of three general appraisers, which shall be on duty at the port of New York, or to any other board of three general appraisers designated by the Secretary of the Treasury for such duty at said port or any other port, "which board shall examine *the case thus submitted*," and that their decision "as to the dutiable value of *such merchandise*" shall be conclusive "against all parties interested therein," and that the collector shall "ascertain, fix, and liquidate the rate and amount of duties to be paid *on such merchandise*, and the dutiable costs and charges thereon according to law."

It seems to me that according to this section the board of general appraisers should have confined themselves to the items with whose appraisement the importer was dissatisfied, those items constituting "*such merchandise*" whose dutiable value was in question, and "*the case thus submitted*" for examination and decision by the board. In other words, I think the board had no original jurisdiction as to the items not complained of by the importer, but had appellate jurisdiction only as to the items covered by the importer's appeal.

Very respectfully yours,

WM. H. TAFT,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

EXCLUSION FROM THE MAILS.

Where a certain book was excluded from the mails on the ground of indecency, by an order of the Postmaster-General issued under the act of September 26, 1888, chapter 1039, and it appeared that certain newspapers were republishing the same book in installments or parts: Advised, that the said order would not justify the exclusion from the mails of every copy of such newspapers, as some of the parts or installments of the book appearing therein may be unobjectionable.

DEPARTMENT OF JUSTICE,
September 29, 1890.

SIR: It appears by your communication of September 9, instant, that, by an order issued by the Postmaster-General, the book known as Tolstoi's Kreutzer Sonata has been ex-

Collection of Customs Duties.

cluded from the mails on the ground of indecency, under the act of September 26, 1888 (25 Stat., 496).

It also appears that certain newspapers, regularly admitted to the mails as second-class matter, are printing the entire story of Kreutzer Sonata in instalments or parts, and the question submitted is, whether the newspapers thus engaged are excluded from the mails by virtue of the said order of the Postmaster-General excluding the story in *book form*.

I do not think the order in question is sufficient to justify the exclusion of every copy of the newspaper in question, because I do not see that it necessarily follows that every instalment of the story thus published is obscene, because the story as a whole is declared to be so. It may be, indeed, that one or more chapters of this story are entirely unexceptionable in character. If so, the exclusion, as unmailable, of newspapers containing them might involve serious consequences to yourself.

Very respectfully yours,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

COLLECTION OF CUSTOMS DUTIES.

Where the date of original importation of merchandise in bond was more than one year prior to August 1, 1890 (when the act of June 10, 1890, chapter 407, entitled "An act to simplify the laws in relation to the collection of the revenue," went into effect): *Advised* that such merchandise is subject to the "additional duty of 1%" per centum" imposed by section 2970, Revised Statutes, by virtue of the saving clause in section 29 of said act of June 10, 1890, which saves to the Government all rights that existed in its behalf when that act took effect.

DEPARTMENT OF JUSTICE,

October 8, 1890.

SIR: Your inquiry under date of September 9, with inclosure, is received.

The question presented is, whether under section 26 of the customs administrative act of June 10, 1890, merchandise which had been entered more than one year prior to August 1, 1890 (when that act went into effect), should be charged

Collection of Customs Duties.

with the "additional duty of 10 per centum" required by the last subdivision of section 2970, Revised Statutes. This section reads as follows:

"Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

Section 20 of the act of June 10 provides that "Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

By section 54 of the tariff act of October 1, 1890, the words "in bond" are inserted in the first line of section 20 after the word "deposited."

While section 2970 is repealed or essentially modified by the provisions of the act of June 10, section 29 thereof contains the saving clause that "the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made."

That construction should be given to the statute that will best give effect to all its parts. The reserving clause of section 29, as applied to section 20, if given full effect, saves to the Government all rights that existed in its behalf when the law took effect.

ATTORNEY-GENERAL.

It will be noticed that the 10 per cent. is made in terms "an additional duty." Upon the expiration of one year from the entry the sum to be paid as then fixed by law comprises the duty assessed, the charges, and the additional duty of 10 per cent. No authority appears for itemizing the amount and remitting the last item.

The amount to be paid is practically established upon the entry at a sum specified in case the property is taken out within the year, and at that sum, plus the 10 per cent. additional, if allowed to remain more than the year. No act remains to be performed on the part of the Government; mere lapse of time ripens the whole into duty.

It is for the importer to obtain his merchandise upon payment of the lesser sum by taking the prescribed action. He omits to act, and by the expiration of the period the whole duty becomes vested in the Government and is an accrued debt against the importer. Therefore, in the case stated, the 10 per centum additional duty in question should be charged and collected.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

It is deemed inexpedient by the Attorney-General, for reasons stated, to give an opinion upon the question whether an express company, in receiving from a lottery company letters and packages declared unmailable by section 3894, Revised Statutes, as amended by the act of September 19, 1890, chapter 908, and forwarding them along the ordinary mail routes, violates section 3982, Revised Statutes.

DEPARTMENT OF JUSTICE,

October 8, 1890.

SIR: In your letter of October 2 you state that the Louisiana Lottery Company has its headquarters in New Orleans; that up to the passage of the act of September 19, 1890, "to amend certain sections of the Revised Statutes relating to lotteries and for other purposes," the lottery company was

Attorney-General.

in the habit of using the mails for the transaction of its lottery business; that this company, since the approval of the act referred to, has advertised that it will use the express companies for the conduct of its business; that your Department is in possession of information from its officers and employés that it is using the express companies, and is sending letters and packets concerning lotteries and containing lists of its drawings at the lotteries and containing lottery tickets by the Southern Express Company and the United States Express Company; and that such letters and packets are made unavailable by section 3894, as amended by the act of September 19, 1890.

Upon this state of facts you ask my opinion as to whether the express companies, in receiving from the lottery company such letters and packets thus declared unavailable and forwarding them along the ordinary mail routes, violates section 3982.

In answer I have to say that your question is essentially judicial in character, and one which must ultimately be decided by the judicial department of the Government. Whether or not, in carrying this matter, the express company or its agents commit a crime for which the statutes impose a penalty, it seems unnecessary and inexpedient for me to decide, further than to say that the facts stated by you seem to make a *prima facie* case of a violation of said section, and to render it proper that you should direct a prosecution of the guilty parties. Such prosecution will result in a judicial construction of the law.

Yours truly,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

Attorney-General.

ATTORNEY-GENERAL.

Where the consideration of questions of law submitted for his opinion involved an examination of evidence and the settling of questions of fact, the Attorney-General declined to enter upon such examination for the reason that it did not fall within his province, and accordingly expressed no opinion on the questions submitted.

DEPARTMENT OF JUSTICE,

October 21, 1890.

SIR: I have examined the opinion of Assistant Attorney-General Shields, referred to in and inclosed with your communication of October 7, 1890, requesting that I would give an opinion upon the questions covered by it.

The Assistant Attorney-General states that the questions submitted to him are as follows:

"First. As to whether the action taken by the Commissioner of Indian Affairs in his letter of March 5, 1889, to the United States Indian agent was with proper authority and operates as remanding the case for proceedings *de novo* before the Choctaw authorities; and, if not,

"Second. As to whether upon the record presented, which was discussed in office report of October 4, 1887, before referred to, the claimants, Glenn, Tucker *et al.*, have established their rights to citizenship in the Choctaw Nation."

I do not think that I could reach any satisfactory conclusion as to these questions, or the important question of Choctaw citizenship, discussed in the opinion of the Assistant Attorney-General, without considering all the evidence that was before him. An effort to do so would be like an attempt by an appellate court to review the action of another court, having only the opinion of that court as the basis of such review. It may be that, while there was no formal adoption as citizens of the persons called "intruders" by the legislative authority of the Choctaw Nation, the evidence would show a state of things from which the adoption of the so-called intruders as citizens by the legislative authority might be reasonably and properly implied, in accordance with well-settled principle. Congress has been frequently held to have sanctioned by implication various practices in different depart-

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ments of the Government, notably the practice of the President to reserve from sale, at his discretion, any part of the public domain for some public purpose (*Grisar v. McDowell*, 6 Wall., 381), and I do not see why the same principle should not be applicable to the legislative authority of the Choctaw Nation.

The existence, then, of this necessity to look into evidence and form a conclusion as to facts places the subject matter on which an opinion is desired outside of my power under the law.

Section 356 of the Revised Statutes provides that "the head of any Executive Department may require the opinion of the Attorney-General on any *questions of law* arising in the administration of his Department," and it has been repeatedly held by my predecessors that the Attorney-General cannot be called upon to form an opinion on a question of fact. (See 7 Opin., 494; 14 Opin., 367, 368, and 541; 10 Opin., 267; 11 Opin., 189; 18 Opin. 487-489.)

I have the honor to be, yours, very respectfully,
W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

CHICKAMAUGA AND CHATTANOOGA NATIONAL PARK.

The provisions of the act of August 19, 1890, chapter 806, entitled "An act to establish a National Military Park at the battle-field of Chickamauga," do not authorize the acquisition of the lands described therein, which are to constitute the proposed national park, in any other mode than by condemnation proceedings instituted under the act of August 1, 1888, chapter 728.

DEPARTMENT OF JUSTICE,
October 22, 1890.

SIR: In a communication of Mr. Assistant Secretary of War Grant to the Attorney-General, of the 6th instant, a letter from the secretary of the Chickamauga and Chattanooga Military Park Commission was inclosed requesting instructions as to its powers and duties, under your authority, to negotiate for the purchase of land within the limits of the proposed National Military Park, without condemnation,

Chickamauga and Chattanooga National Park.

under the act of Congress approved August 19, 1890. The request of the Assistant Secretary for an answer to the second clause of the letter from the commission is construed to be a request for an opinion upon the powers of the Secretary of War to negotiate for the purchase of land under the above-mentioned act. If the question covered only the powers and duties of the park commission, the Attorney-General would be constrained to decline to express an opinion. While the commission is properly to be regarded as within the War Department, the questions which the Attorney-General is required to answer are only those the decision of which is needed to govern the action of the head of a Department in cases actually arising therein. So much is said to show that this opinion is not intended to be a departure from the rule stated, and thus far rigidly followed, with respect to the character of the questions that the Attorney-General will answer.

The only provision in the act of August 19, 1890, for the acquiring, by the Government, of title to the land therein described, is found in section 3, which is as follows:

"That the said Chickamauga and Chattanooga National Park, and the approaches thereto, shall be under the control of the Secretary of War, and it shall be his duty, immediately after the passage of this act, to notify the Attorney-General of the purpose of the United States to acquire title to the roads and lands described in the previous sections of this act, under the provisions of the act of August first, eighteen hundred and eighty-eight; and the said Secretary, upon receiving notice from the Attorney-General of the United States that perfect titles have been secured to the said lands and roads, shall at once proceed to establish and substantially mark the boundaries of the said park."

The act of August 1, 1888, chap. 728, (25 Stat., 357), entitled "An act to authorize condemnation of lands for sites of public buildings, and for other purposes," provides in its first section that—

"In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public use, he shall be, and

Chickamauga and Chattanooga National Park.

hereby is, authorized to procure the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice."

The second and only other section of the act refers to the form of proceeding in such condemnation cases.

Section 3 of the act of 1890, above quoted, shows, beyond question, that the duty of the Secretary of War is to notify the Attorney-General immediately after the passage of the act to acquire title under the provisions of the act of August 1, 1888.

No time, therefore, is given by the act of 1890 to any one to negotiate for the purchase of the land before involving the action of the Attorney-General under the act of 1888. That act confers no power on any one to negotiate for the purchase of land. It only provides that where an officer is authorized otherwise to purchase, he may purchase by condemnation. The duty of the Attorney-General under the act is confined to instituting and supervising the judicial proceeding for condemnation. The necessary effect of the two statutes read together is, therefore, to exclude the existence of authority in the Secretary of War, or any one else, to acquire title to the lands in question, for the United States, in any way except by condemnation.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF WAR.

Approved:

W. H. H. MILLER.

Obstruction to Navigation.

OBSTRUCTION TO NAVIGATION.

The case of the county bridge over the Muskingum River at Taylorsville, Ohio, on which an opinion of the Attorney General was given July 19, 1890, (*ante*, p. 599), distinguished from the case of the bridge of the Baltimore and Ohio Southwestern Railway Company across the same river at Marietta, Ohio, subsequently presented, and that opinion shown to be inapplicable to the latter case by reason of recent statutory amendments affecting it.

DEPARTMENT OF JUSTICE,

October 23, 1890.

SIR : I have the honor to acknowledge the receipt of your letter of September 8, with inclosures, in relation to the railroad bridge at Marietta, Ohio. In this letter you call my attention to the opinion given by this Department on July 19, 1890, holding that the county bridge over the same river Muskingum, at Taylorsville, Ohio, was a nuisance, and state that the two cases were regarded as identical, and that one opinion would serve in both; that accordingly, after the receipt of the opinion in reference to the Taylorsville bridge, notice was served upon the parties interested in both bridges, under sections 9 and 10 of the act of August 11, 1888.

You further state: "The Baltimore and Ohio Southwestern Railway Company, the owners of the bridge at Marietta, now claim that their case differs from that at Taylorsville in that the Government is constructing at Marietta what they call an 'ice harbor.'

"It will be seen that the improvement at Marietta is absolutely necessary to the navigation of the Muskingum River, and that all improvements as well as all navigation above there depends entirely upon this, it being near the confluence of the Muskingum with the Ohio. The construction of the ice harbor is in the interest of the navigation of the river, as it is simply to afford a safe harbor in the winter for the craft navigating the Muskingum, and also for such of the Ohio River boats as may see fit to go into it for a winter harbor. It is not seen how the fact of this winter harbor can in anywise take the case out of the law governing the case of the bridge at Taylorsville."

You do not in your communication formulate any question to which you desire an answer. From the whole tenor of

Obstruction to Navigation.

your communication, however, I infer that you desire my opinion as to whether any legal distinction exists which might make the opinion given with reference to the Taylorsville bridge inapplicable to the railroad bridge at Marietta. In answer, I have to say that since the opinion was given in reference to the Taylorsville bridge the law upon this subject has been very materially changed by act of Congress. Section 4 of the act known as the "river and harbor bill" approved September 19, 1890, amends section 9 of the "river and harbor" act of August 11, 1888, in a very material way, as you will see by a comparison of the two sections.

In the first place, before the word "obstruction," in the fourth line of that section, the word "unreasonable" is inserted, thereby, as it seems to me, clearly presenting a question of fact, which can not be determined by this Department, which can and must be determined in the first instance by you, but in regard to which your determination is probably subject to review in the courts. With reference to the Taylorsville case no such question was presented. Upon the facts of that case, even had the law been the same, perhaps the same question would not have arisen; but as the law then was, it certainly was not presented in the same aspect. Upon the whole, then, I think this case is not covered by the opinion in the Taylorsville case, and I can not undertake to advise as matter of law whether this bridge presents an "unreasonable" obstruction or whether its maintenance is in violation of the statutes. To determine that question involves an examination of all the facts, circumstances, and equities surrounding the case, which are by no means all on the side of the Government.

I call your attention also to the change of the same section of the statute further along, requiring you to specify the changes required to be made and to refer the matter to the district attorney instead of to the Attorney-General, in case proceedings are desired. Some changes are also made in section 10, but I need not go into these.

I return herewith the papers sent with your letters.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF WAR.

Alaska—National Banking Association.

ALASKA—NATIONAL BANKING ASSOCIATION.

The laws relating to national banking associations are, by virtue of the act of May 18, 1884, chapter 53, in force in the Territory of Alaska, and such associations may be lawfully organized in that Territory.

DEPARTMENT OF JUSTICE,
October 24, 1890.

SIR: Your communication of October 3, instant, requests an opinion on the question "whether it is lawful for national banking associations to be organized in the Territory of Alaska."

By the act of May 18, 1884 (23 Stat., 24), a civil government is established for the Territory of Alaska which is made "a civil and judicial district." By that act, section 9, the laws of the United States not locally inapplicable, or inconsistent with the act, are extended to that Territory, and it is, furthermore, provided (sec. 7) "That the general laws of the State of Oregon now in force are hereby declared to be the law of said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States," etc. And by the same section, the district court established for the district of Alaska by section 3 is empowered to exercise jurisdiction over common law and equity cases.

Section 5134 of the Revised Statutes provides that "the persons uniting to form such an [national banking] association shall, under their hands, make an organization certificate, which shall specifically state: * * *

"Second. The place where its operations of discount and deposit are to be carried on, designating the State, *Territory*, or district, and the particular county and city, town, or village." * * *

There appears to be no good reason for saying that the laws establishing and regulating national banks are not in force in the Territory of Alaska by virtue of the general provision of the act of May 18, 1884, already referred to, and in view of the fact that the last-mentioned act has provided the Territory with a system of laws and a court for their enforce-

Advertisement of Prizes for Guesses.

ment, it would seem to follow that national banking associations may be safely and properly organized there. Your question is, therefore, answered in the affirmative.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ADVERTISEMENT OF PRIZES FOR GUESSES.

Where a newspaper contained an advertisement offering in good faith a certain sum of money to the sender of the first "guess" giving the correct or nearest number of votes which each of two opposing candidates, of different political parties, for a designated State office, shall receive at the next ensuing election, the guessing period to end with the day on which the election takes place: *Held*, that the scheme thus advertised is not one offering a prize "dependent upon lot or chance," within the meaning of section 3894, Revised Statutes, as amended by the act of September 19, 1890, chapter 908, and that the newspaper containing the advertisement is not, by the provisions of said section, excluded from the mail.

DEPARTMENT OF JUSTICE,
October 31, 1890.

SIR: In response to the inquiries made under date of the 6th instant as to whether advertisements in newspapers of the "guessing contest," in its various phases, are in violation of section 3894 of the Revised Statutes, as amended by the act of September 19, 1890, I submit this answer.

With other inclosures you transmit the advertisement of the Cincinnati Enquirer setting forth one of these projects in detail, and as this exhibit presents the material question quite distinctly I will make use of it for the purposes of this answer.

The scheme or "enterprise" advertised by the Enquirer is that it will give to the sender of the first "guess" giving the correct or nearest correct number of votes of the Democratic and of the Republican candidates, respectively, for the office of secretary of state for the State of Ohio at the next election, \$100 each; and to the sender of the second correct or nearest correct guess (if no correct guesses are received) of the vote of either candidate, \$50 each; and to the sender of the third correct guess or nearest correct guess (if no correct

Advertisement of Prizes for Guesses.

guesses are received), \$25 for each candidate; and \$5 each to the senders of the next fifteen correct or nearest correct guesses (if no correct guesses are received) on each candidate; thus offering to give the amount of \$500 to thirty-six persons.

A blank form set forth provides for the writing in of the number of votes that the person competing shall see fit to designate, and for entering his name and residence. The designating period is to end with the day upon which the election is held. The caption of the advertisement is "*Thousands in it,*" and it is announced that "if no correct guesses are received the nearest correct guess will be entitled to the prize."

The scheme of this newspaper requires that all "guesses" shall be upon blanks cut from copies of its issues, and the guess must be sent in within a limited time.

It is provided that any person may guess, and that each may guess every day and as many times each day as the person shall see fit to do so.

If this offer were not made in good faith it would be a scheme devised for obtaining money under false pretenses. Being made in good faith, the gifts are doubtless offered with the purpose of increasing directly as well as indirectly the sale of the issues of the newspapers and of rendering its business of increased value to those who offer the prizes.

The statute reads as follows:

"No letter, postal card, or circular concerning any lottery, so called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money-order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the draw-

Advertisement of Prizes for Guesses.

ings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawings, be carried in the mail or delivered by any postmaster or letter carrier."

The prohibition directly material to this inquiry is :

"Nor shall any newspaper * * * or publication * * * containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance * * * be carried in the mail or delivered by any postmaster or letter carrier."

In construing this law it is not to be forgotten that it is not only penal, but that it is in derogation of the right or privilege usually accorded to citizens in the use of the mails. It is, therefore, to be strictly construed as against the Government. It is clear that the statute is directed against only such enterprises as are "dependent upon lot or chance." It will hardly be contended that the enterprise under consideration was dependent upon lot. Was it dependent upon chance within the meaning of the statute? It seems to me this question must be answered in the negative. In a certain sense and in a certain degree, perhaps, any prediction as to human action may be said to be dependent upon chance; that is to say, it is in some measure dependent upon circumstances, the happening of which can not be anticipated or foretold with any degree of certainty. But, at the same time, it can not be said that a prediction that a man who has lived a life of uprightness for fifty years will during the remainder of his life continue so to live, or that a man who has been a successful business man for fifty years will so continue, or that a man who has maintained certain opinions, religious, political, or economical, will continue in the same line, is dependent upon chance. It is, of course, quite possible that such man may utterly change his habits of life, business, or opinions, but such change will not be purely matter of chance. So with regard to the case in hand. A student of statistics might know approximately the number of Republican votes and the number of Democratic votes in the State of Ohio; he might approximate the ratio in which one and the other might increase or decrease in a given year. It is quite likely that his estimates would often be wide of the mark, but it would not be by reason of chance but by reason of causes in regard

Oklahoma—Territorial Legislature.

to which he had formed erroneous estimates. It would hardly do to say that a child or a school boy could form as correct an estimate in the matter as an experienced politician who had been giving weeks and months of steady attention to the consideration of the question. But, without further elaboration, I am quite clear that estimates made upon the probable political action of the people in a given State in a pending election can not be said to be dependent upon chance, within the meaning of this statute, and that, therefore, this enterprise was no infraction of the lottery law in question.

In conclusion it may not be improper to say that this law was framed with a view to the suppression of certain well known and wide spread agencies for evil; and it is certainly not wise to embarrass its execution by a strained or unnatural construction, in reaching after practices not thought of as a motive for its enactment.

Very respectfully,

W. H. H. MILLER.

The POSTMASTER-GENERAL.

OKLAHOMA—TERRITORIAL LEGISLATURE.

When the legislature of Oklahoma Territory, at its first session, took a recess for one or more days on account of an approaching election: Advised, that the period covered by the recess should be counted as part of the one hundred and twenty days limited for such session, by section 4 of the (organic) act of May 2, 1890, chapter 182.

DEPARTMENT OF JUSTICE,
November 8, 1890.

SIR: I have the honor to acknowledge the receipt of a note from Executive Clerk Tibbott, under date November 6, instant, inclosing a letter of Governor Steele, of Oklahoma, in which he makes the following statement:

"The legislature has taken a recess until November 5, on account of the coming election, and has stated in a joint resolution that it is not to count in the one hundred and twenty days that is provided in the organic act this body may hold session."

Oklahoma—Territorial Legislature.

The Governor thereupon desires my opinion as to whether the time covered by such adjournment must be counted as a part of the session; that is, a part of the one hundred and twenty days.

The provision of the organic act, in section 4, is as follows:

"The session of the legislative assembly shall be biennial, and shall be limited to sixty days duration, *Provided, however,* That the duration of the first session of said legislative assembly may continue one hundred and twenty days."

On the 16th day of March, 1889, I gave to the honorable the Secretary of the Interior, an opinion as follows:

[Here follows the opinion referred to, which relates to the Arizona legislature, and will be found on page 260, *ante.*]

The law as to Oklahoma seems to be not different from that applicable to Arizona.

I see no reason to change the view there expressed. On the contrary, many reasons reinforcing that opinion occur to me. If the legislature may adjourn once and exclude the time of adjournment from the time limited for its session, it may adjourn twice, or any number of times. It may practically continue its session from time to time throughout the year. I can not believe that such was the purpose of Congress. Such adjournments would necessarily add greatly to the expense of the session, and would interfere with the orderly transaction of the business which under the law is devolved upon the legislature.

It seems to me, therefore, that the legislature should conclude its business within one hundred and twenty days from the commencement of its session.

I return Governor Steele's letter.

Respectfully yours,

W H. H. MILLER.

The PRESIDENT.

Swamp-land Grant.

SWAMP-LAND GRANT.

A bill in equity will not lie against the State of Minnesota for the purpose of vacating a patent issued to that State under the swamp-land grant, on the mere ground that the land thus patented was not in fact swamp land.

DEPARTMENT OF JUSTICE,
November 10, 1890.

SIR : I have considered your letter of September 22, 1890, asking an opinion as to whether a suit will lie against the State of Minnesota by the United States for the purpose of vacating a patent issued by the United States to that State under the swamp-land grant, on the ground that the lands covered by the patent were not swamp lands and therefore were not within the grant.

After a careful consideration of your communication I have reached the conclusion that a bill will not lie for the purpose of cancelling the patent on the mere ground that the land in question was not swamp land.

For the purposes of the swamp-land act the Secretary of the Interior was made by law the *tribunal* to decide what lands in Minnesota were swamp, and his decision of that question must be regarded as final everywhere, unless impeachable on grounds on which the decisions of other tribunals may be set aside in equity. It may be that patents will be annulled in equity at the suit of the United States for the same reasons that ordinary deeds and instruments are vacated by the courts; but, in my judgment, the determination of the Secretary of the Interior as to what lands are swamp stands on much higher ground than the ordinary proceeding of issuing a patent on an *ex parte* hearing. The fact determined is necessarily the basis of a great number of titles, and it can not be supposed that Congress intended that this great fundamental fact should be retried so often as anybody saw fit to make a question about it. Such a construction of the law would have a direct tendency to impair the value of the swamp-land grant and discourage persons from dealing in titles originating in a swamp-land patent.

In *French v. Fyan* (93 U. S. R., 169) and *Wright v. Roseberry* (121 U. S. R., 488) the Supreme Court speak of the

Eight-Hour Law.

Secretary of the Interior as the *tribunal* to decide what lands are swamp. In the former case the court uses this strong language (p. 171):

"We are of opinion that this section [section 2 of the swamp-land act] devolved upon the Secretary, as the head of the Department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling."

Then, to emphasize the position, the court makes a quotation from *Johnson v. Towsley* (13 Wall., 72) to the effect that the decisions of special tribunals on matters referred to them by law must be upheld.

There is but one conclusion to be drawn from this, and it is that the decision of the Secretary of the Interior as to swamp lands is analogous to a judgment in a suit *inter partes*, and can only be impeached in equity on the grounds stated in the Supreme Court in *United States v. Throckmorton* (98 U. S. R., 61.)

I return the papers herewith. They could have been of no use to me, because I must confine myself to the case stated for an opinion, and am not authorized to look into evidence.

I have the honor to be, very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

EIGHT-HOUR LAW.

Power of the President considered with reference to the administration of the eight-hour law.

DEPARTMENT OF JUSTICE,

November 12, 1890.

SIR: I have looked at the memorial presented to you by Thomas S. Denham, president of the Federation of Labor Unions of the District of Columbia, with reference to the eight-hour law, and am quite clear you have no power to issue such an order as is asked.

Eight-Hour Law.

In the first place, as is decided in *United States v. Martin* (4 Otto, 400), the act of Congress of June 25, 1868, providing that "Eight hours shall constitute a day's work for all laborers, workmen and mechanics now employed, or who shall hereafter be employed, by or on behalf of the Government of the United States," simply prescribes a unit of measure for a day's work in the absence of any specific contract. It is no more and no less, in legal effect, than if Congress should provide that in all contracts for the purchase of coal by officers of the United States Government 2,000 pounds should constitute a ton. Surely no lawyer would claim that such a statute, either directly or by implication, would forbid an officer to pay more for 2,240 than for 2,000 pounds of coal.

In the next place it is undeniable that there are many branches of the Government service in which, without the greatest inconvenience, the day can not be limited to eight consecutive hours, as for instance post-office clerks, letter carriers, route agents upon railroads, etc. So it will often happen that the public service may and will require the working of extra hours in order that public exigencies may be met.

Again sections 3709, etc., require contracts for supplies or services on behalf of the Government, except for prisoners' services, to be made with the lowest responsible bidder, after due advertisement. These statutes make no provision for the length of the day's work by the employés of such contractors, and a public officer who should let a contract for a larger sum than would be otherwise necessary by reason of a condition that a contractor's employés should only work eight hours a day would directly violate the law.

In short, the statutes do not contain any such provision as would authorize or justify the President in making such an order as is asked. Nor does any such authority inhere in the Executive office. The President has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the Government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power

Bituminous Coal—Drawback.

to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties.

The relief asked in this matter can, in my judgment, come only through additional legislation.

Very respectfully,

W. H. H. MILLER.

The PRESIDENT.

BITUMINOUS COAL—DRAWBACK.

The provision in the act of March 3, 1883, chapter 121, allowing a drawback on bituminous coal imported into the United States, which is afterwards used for fuel on steam vessels of the United States engaged in the coasting or foreign trade, is repealed by the act of October 1, 1890, chapter 1244.

Sembler that the term "supplies," as employed in section 16 of the act of June 26, 1884, chapter 121, includes coal.

DEPARTMENT OF JUSTICE,

November 17, 1890.

SIR: I have the honor to acknowledge the receipt of your communication of the 4th instant, requesting an opinion whether the provision for drawback upon bituminous coal (22 Stat., 511) is repealed by section 55 of the act of October 1, 1890, entitled "An act to reduce the revenue and equalize duties on imports and for other purposes."

A brief review of the legislation on this subject discloses the following facts:

Section 2504, schedule M, sundries (Rev. Stat., 1874, p. 474), provides a duty upon imported coal in the following language: "Slack coal or culm, such as will pass through a half-inch screen, forty cents per ton of twenty-eight bushels, eighty pounds to the bushel; bituminous coal, and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel."

In the revision of the tariff act of March 3, 1883 (22 Stat., 511), section 2502, schedule N, sundries, a drawback was provided upon bituminous coal. As found in the Revised Statutes the provisions both for "slack coal or culm," and "bituminous coal," are provided for in a *single* paragraph. In the

Bituminous Coal—Drawback.

law of March 3, 1883, *supra*, the provision for duty upon coal, slack or culm, and bituminous, are *separated*, each having its appropriate paragraph. The duty upon bituminous coal is thus provided: "Coal, bituminous and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel. A drawback of seventy-five cents per ton shall be allowed on all bituminous coal imported into the United States which is afterwards used for fuel on board of vessels propelled by steam which are engaged in the coasting trade of the United States, or in the trade with foreign countries, to be allowed and paid under such regulations as the Secretary of the Treasury shall prescribe." To this act Congress gave a legislative construction by section 10 of an act entitled "An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes." (24 Stat., 81.) By the provisions of this last section the right to drawback was to be construed to apply "only to vessels of the United States."

The law stood thus until the passage of the act of October 1, 1890.

It will be noted in Schedule N, "Sundries," of the last named act, that Congress reversed the relative position of the paragraphs relating to coal, bituminous and shale, and slack or culm, making them stand as follows: "Coal, bituminous and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel; coal, slack or culm, such as will pass through a half-inch screen, thirty cents per ton of twenty-eight bushels, eighty pounds to the bushel," and also omitted the provision for drawback upon bituminous coal as found in the act of March 3, 1883.

An examination of the act of October 1, 1890, discloses no clause directly repealing this drawback, unless it be found in section 55, "that all laws and parts of laws inconsistent with this act are hereby repealed."

Evidence from the internal construction of the act, as well as the history of its enactment, leads irresistibly to the conclusion that "the tariff part of the bill contemplates and proposes a complete revision. It not only changes the rate of

BITUMINOUS COAL—DRAWBACK

duty, but modifies the general provisions of law relating to the questions of duty."

It may be contended with force that the provisions of the law of 1883, contained in a separate paragraph, providing for the duty and the drawback, are to be considered and construed collectively, and that when the act of October 1, 1890, provided for a duty and omitted the drawback that such provision is in *terms inconsistent* with the prior law and thus repeals the former duty.

However this may be, it is settled that "if a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute equally intends *to prescribe the only rule* which shall govern it repeals the prior one." (*State v. Stoll*, 17 Wall., 425; *Davies v. Fairbairn*, 3 Howard, 630; *United States v. Clafin*, 97 U. S., 546; *Cook County National Bank v. The United States*, 107 U. S., 445.)

Another rule of construction equally well settled is that a statute is impliedly repealed by a subsequent statute making new provisions plainly intended as a *substitute* for it. (*United States v. Henderson*, 11 Wall., 652; *Wood v. United States*, 16 Pet., 342; *Fabbri v. Murphy*, 95 U. S., 191.)

That the attention of Congress must have been called to the fact of the omission of the clause relating to drawback is evident, because the provision formed a part of the original law, and because of the change in the relative positions of the paragraphs relating to coal, slack or culm, and coal, bituminous and shale, referred to above.

It will be seen also that the act of October 1, 1890, in respect to duties upon other articles concerning which drawbacks were previously allowed, retains the same provision as in the prior existing law. Thus section 25, relating to imported materials on which duties have been paid, used in the manufacture of articles manufactured or produced in the United States, provides that "the drawback on any article allowed under existing law shall be continued at the rate herein provided."

So also the drawback mentioned in Schedule C, metals and manufactures of, iron and steel, paragraph 143, and that on salt, agricultural products, etc., paragraph 322. It can

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not be assumed that Congress thus deliberately omitted a clause relating to a drawback in a general revision of the subject of duties without intending so to do.

I am, therefore, of the opinion that so much of the act of March 3, 1883, Schedule N, "Sundries," as relates to the drawback upon coal, bituminous and shale, is repealed by the act of October 1, 1890.

You will note that my opinion thus far answers the specific question asked. I deem it my duty to call your attention to section 16 of the act of June 26, 1884, chapter 121. This section is as follows:

"Sec. 16. All articles of foreign production needed, and actually withdrawn from bonded warehouses, for supplies not including equipment of vessels of the United States engaged in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, may be so withdrawn free from duty, under such regulations as the Secretary of the Treasury may prescribe."

It would seem to admit of little doubt that "supplies" include coal.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

DUTY ON LEAD ORE.

Under paragraph 199 of the act of October 1, 1890, chapter 1244, imported lead ore is dutiable at the rate of 1½ cents a pound, irrespective of the quantity of lead which the ore may contain.

The words "all other ores," as used in the proviso of that paragraph, mean all ores other than those known commercially as lead ores.

DEPARTMENT OF JUSTICE,
November 19, 1890.

SIR: Your communication of the 8th instant calling my attention to paragraph 199 of Schedule C of the tariff act of October 1, 1890, and to the letter of Assistant Secretary Spaulding, of date of the 30th ultimo, to the collector of customs at El Paso, Tex., and to other inclosures, and to decisions of the Treasury Department (Synopsis 4391, 7327, 7543,

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and 9662), and requesting my opinion as to the construction of said paragraph, was duly received.

Availing myself of the references and suggestions submitted, I have the honor to answer:

The tariff law of June 30, 1864, (13 Stat., 206), imposes a duty as follows: "On lead ore, one and a half cents per pound."

The act of March 3, 1883, (22 Stat., 500), in Schedule C, imposes a duty as follows: "Lead ore and lead dross, one and one half cents per pound."

Paragraph 199, of the act of October 1, 1890, provides that there shall be levied, collected, and paid upon imported "lead ore and lead dross, one and one half cents per pound: *Provided*, That silver ore and all other ores containing lead shall pay a duty of one and one-half cents per pound on the lead contained therein, according to sample and assay at the port of entry."

The meaning most obviously suggested by a consideration of the language used is that a duty of $1\frac{1}{2}$ cents per pound shall be paid upon the commodity known as lead ore, and that a similar duty shall be paid upon that known as lead dross; while upon ores that are not known commercially as lead ores, and which yet contain lead of an appreciable value, a duty of $1\frac{1}{2}$ cents per pound shall be paid, not upon these ores, but upon the lead which sample and assay shall show them to contain.

A construction which makes "all other ores" in the proviso cover "lead ore" of the first line would render the first line meaningless as to lead ore, or would place the same rate of duty upon lead twice in the paragraph.

Under the law of 1883 lead ore as such bore the same duty as dross as such. If only the lead which may be extracted from this ore is now dutiable, then it follows that lead ore and dross have been separated without an expressed purpose to do so, or that it is only the lead which the dross contains that is dutiable.

In order to discover the intent of Congress in this enactment it may be instructive to consider the rulings of your Department in relation to the subject-matter.

Under date of January 14, 1880 (Synopsis, 4391), it is de-

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cided as to certain ores claimed to be entitled to free entry from Mexico as silver ore, that "The value of the silver contained in the ore being largely in excess of the value of the iron, the Department is of the opinion that the ore is entitled to entry free of duty as 'silver ore.'"

No one denies that Congress, by said act of March 3, 1883, placed a duty of $1\frac{1}{2}$ cents per pound on lead ore and lead dross.

Under date of January 25, 1886 (Synopsis, 7327), the Assistant Secretary decides—

"That when silver in any ore predominates in value it is considered to be silver ore, and, as such, is exempt from duty under the special provisions in the free list for ores of gold and silver. Where, however, lead predominates in value the ore is considered as a lead ore, and is subjected to a duty at the rate of $1\frac{1}{2}$ cents per pound under the special provisions in the tariff act for 'lead ore and lead dross.'"

Under date of May 27, 1886 (Synopsis, 7543), the Acting Secretary of the Treasury decides—

"That ores composed of silver and lead and iron, or silver and lead, or silver and other base metals of which silver is the component material of chief value, would, under the ruling of January 25, 1886 (Synopsis, 7327), be exempt from duty under the provision in the free list (T. I., new, 752) for 'ores of * * * silver.'

"It is immaterial in the entry and classification of such ores whether the ores are imported for use as fluxes in the fusion of other metals, or on account of the metals themselves."

Your circular of October 18, 1889 (Synopsis, 9662), reviews and approves these rulings and holds that ores known commercially as ores of silver, although containing lead in appreciable or considerable quantity, are not dutiable under the law of 1883, and that it must be assumed that the rulings and practice of the Department were known to Congress when it passed that act; and that it must be held that the designation of lead ore and silver ore in the tariff, in the absence of legislative definition, was that of existing decisions.

In view of these instances of official construction Congress enacted the provisions of the act of 1890, above quoted. It is not reasonable to suppose that, without employing words

Property Lost in the Military Service.

clearly indicating a purpose to do so, the classification was changed from "lead ore" to "ores containing lead," while reenacting in the leading portion of the paragraph the words of the provision of the act of 1883.

Nor can it fairly be inferred, without words plainly showing such an intention, that the duty was dropped from $1\frac{1}{2}$ cents per pound on lead ore down to the same rate on the lead contained in the ore.

The language which Congress has deemed it proper to employ where it intended to place a duty only upon the metal that an ore contains is shown in the paragraph relating to copper, where the following words are used (par. 191): "Copper imported in the form of ores, one-half of one cent per pound on each pound of fine copper contained therein."

The rules of statutory construction forbid the conclusion that it was the legislative design to make lead ore dutiable only upon the lead contained therein without the use of the same or equivalent language.

In my opinion it is manifest that the words "all other ores," as used in the proviso of paragraph 199, mean all ores other than those designated by the words "lead ores," construed according to commercial usage and Departmental decision.

I therefore hold that imported lead ore is dutiable at the rate of $1\frac{1}{2}$ cents per pound without regard to the amount of lead which the ore may contain.

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

PROPERTY LOST IN THE MILITARY SERVICE.

The duty of the Secretary of War in the case of a claim under the act of March 3, 1885, chapter 335, is limited to the determination of whether the property for the loss of which indemnity is claimed was "reasonable, useful, necessary, and proper" for the claimant.

Whether the loss happened under the circumstances described in the statute, and comes within the provisions thereof, is a question for the determination of the proper accounting officers of the Treasury, and so does not appertain to the administration of the War Department.

Property Lost in the Military Service.

DEPARTMENT OF JUSTICE,
November 26, 1890.

SIR: Your communication (No. 2300) asks an opinion on the following questions:

(1) As to whether a cavalry officer can recover under this statute for the loss of a horse by disease or killed in consequence of disease. And, under this head, whether the extra pay allowed to a cavalry officer does not cover the risk and expense of his horse.

(2) What the duties of the Secretary of War are under this statute.

These questions arise upon the act of Congress of March 3, 1885 (23 Stat., 350), entitled "An act to provide for the settlement of the claims of officers and enlisted men of the Army for the loss of private property destroyed in the military service of the United States."

The act authorizes and directs "the proper accounting officers of the Treasury" "to inquire into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service under the following circumstances." It then goes on to state three conditions of fact under which indemnity may be paid for the loss of private property, and provides that such indemnity "shall be limited to such articles of personal property as the Secretary of War, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty."

It seems to us that the law makes it the duty of the Secretary of War to determine in each case whether the property for the loss of which indemnity is claimed is "reasonable, useful, necessary, and proper" for the claimant, and that there his authority under the act ends.

The value of the property so determined by the Secretary of War to be "reasonable, useful, necessary, and proper," and the question whether the loss happened under the circumstances set forth in the act, are, in my opinion, to be determined by "the proper accounting officers of the Treasury." In other words, those officers must apply the statute to the particular facts of each case.

Attorney-General.

If this view be correct, the first question submitted has no relation to a matter that arises in the administration of the War Department, and for that reason I have no authority to answer it. Section 356, Revised Statutes, only authorizes the head of a Department "to require the opinion of the Attorney-General on any questions of law arising in the administration of his Department." (See also 6 Opin., 24; 13 Opin., 531, 568.)

The second question I have answered already.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF WAR.

ATTORNEY-GENERAL.

The Attorney-General declines to give an opinion upon a question as to the meaning of a Territorial statute, where the question does not appear to have arisen in the administration of the Department proposing it.

DEPARTMENT OF JUSTICE,
November 26, 1890.

SIR: Your communication of November 5, instant, asks an opinion upon the meaning of certain language used in the funding law of the Territory of Arizona.

It would give me pleasure to answer the question submitted if I could do so without stepping beyond the limits within which Congress has restricted me, but as the question submitted does not appear to have arisen in the administration of the business of the Department of the Interior I am not at liberty to consider it.

Section 356 of the Revised Statutes of the United States provides "That the head of any Executive Department may require the opinion of the Attorney-General on any questions of law *arising in the administration of his Department.*"

In several instances my predecessors as well as myself have felt constrained to decline to give opinions asked for by heads of Departments upon questions not arising out of matters before them for official action. For instance, Attorney-General Brewster declined to give an opinion at the request of the

Attorney-General.

Postmaster-General made by direction of a resolution of the House of Representatives, placing his refusal on the ground that the question submitted had no connection with a matter before the Post-Office Department. It may be added that, on a previous occasion, Attorney-General Brewster declined to give an opinion on a question directly submitted to him by a resolution of the House of Representatives (18 Opin., 107, 108; 14 Opin., 177; 6 Opin., 24).

These authorities leave no alternative to the conclusion above stated.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

ATTORNEY-GENERAL.

It is not within the province of the Attorney-General to make a finding of facts in a case submitted for his opinion upon questions of law arising thereon. The facts of the case should be ascertained and presented by the officer requesting the opinion.

DEPARTMENT OF JUSTICE,

November 28, 1890.

SIR: Your communication of November 5, instant, asking an opinion as to whether the whistling buoy patent has expired, after stating the facts upon which the question submitted arises, goes on to ask that these statements of fact may be verified by me, and "if found to be true that the Department may be informed as to whether the Light-House Board may or may not manufacture this whistling buoy, or contract for its manufacture, without infringement on the rights of the deceased patentee, Courtenay, or his heirs or assigns."

I beg leave to say that it is not within my competency to make a finding of facts in any case, and that I can only give an opinion on questions of law arising upon a state of facts presented to me by the officer requesting my opinion.

The rulings to this effect, as well by my predecessors as myself, are numerous. (10 Opin. 267; 11 *ib.*, 189; 12 *ib.*,

Imported Molasses.

205; 18 *ib.*, 487.) "Where," says Attorney-General Stanbery, "a question of law arises upon facts submitted to the Attorney General, *such facts must be agreed and stated as facts established.*"

It will be my pleasure to pass upon the question submitted so soon as the facts are presented in conformity to the long settled practice of the Attorney-General's office and the Department of Justice.

Very respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

IMPORTED MOLASSES.

Imported molasses can not, under paragraph 241 of the act of October 1, 1890, chapter 1244, be refined in bond without payment of duty between March 1 and April 1, 1891. The provisions of that paragraph are applicable only to sugars in solid form.

DEPARTMENT OF JUSTICE,

November 28, 1890.

SIR: Your communication (5650, F.) submits for an opinion the questions, "whether imported molasses may be refined in bond, during the month of March, 1891, under the provisions of paragraph 241 of the act of October 1, 1890, or whether said provisions must be restricted to sugars imported in the solid form."

The law says (par. 241) that "sugars not exceeding number sixteen Dutch standard in color may be refined in bond without payment of duty" between March 1 and April 1, 1891. This provision clearly applies to sugars in solid form. The reference to "number sixteen Dutch standard in color" seems to place this beyond question.

Commercially, and under the act in question, *sugar* is one thing and *molasses* another thing.

Paragraph 726 admits to free entry *sugars* not above a certain standard, and *molasses*; and paragraph 241 declares "That the provisions of this act providing terms for the admission of imported *sugars and molasses*, and for the payment of a bounty on sugars of domestic production, shall take

Letters Patent—Application for Renewal.

effect on the first day of April, eighteen hundred and ninety-one."

To hold, then, that molasses may be refined in bond would be to confound the distinction between it and sugar, known to commerce and recognized in the tariff, and would lead, necessarily, to the extension of the bounty on sugar to molasses.

Paragraph 726, admitting to free entry sugar and molasses, already referred to, shows that Congress had no intention to include under the term "sugars" anything but sugar in the solid form. Its enumerations can be understood in no other way, it seems to me. This paragraph is as follows:

"Sugars, all not above number sixteen Dutch standard in color, all tank bottoms, all sugar drainings and sugar sweepings, sirups of cane juice, melada, concentrated melada, and concrete and concentrated molasses, and molasses."

It results, therefore, that "molasses" can not be refined in bond under paragraph 241 of the tariff.

Very respectfully, yours,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

LETTERS PATENT—APPLICATION FOR RENEWAL.

Where letters patent were allowed on the original application, December 9, 1887, but the final fee was not paid as required by statute; and the same were again allowed on a renewed application, under section 4897, Revised Statutes, December 4, 1889; and (payment of final fee as required not having been made on the last allowance) a second application for renewal, under said section, was filed June 7, 1890: Advised that the applicant is not entitled to an allowance of letters patent on such second application, the statutory limitation (two years) imposed by said section having attached before the filing thereof.

DEPARTMENT OF JUSTICE,

November 29, 1890.

SIR: Your letter of the 27th ultimo, inclosing a communication from the Commissioner of Patents addressed to you and bearing date October 23, is received.

The case presented for an opinion is as follows:

June 25, 1887, Charles Nicholson filed an application for letters patent for an improvement in motors.

Letters Patent—Application for Renewal.

December 9, 1887, letters patent were allowed on the application and the applicant was duly notified to pay the final fee as provided by law.

This fee was not paid within the six months prescribed by statute.

December 4, 1889, the applicant paid \$15 as a renewal fee, and renewed his application under section 4897, Revised Statutes.

December 11 the application was duly allowed and the applicant was notified to pay the final fee under the statute.

This the applicant neglected to do.

June 7, 1890, the applicant filed a second application for renewal, accompanied with a renewal fee of \$15.

The question presented as limited by the case stated is whether under the circumstances detailed Nicholson is entitled to be allowed letters patent upon this application.

Section 4897, under which this renewal is now sought, contains this limitation: "But such second application must be made within two years after the allowance of the original application."

As the original letters were allowed December 9, 1887, while the application for renewal now claimed under was not filed until June 7, 1890, it is manifest that the statutory limitation had attached before such filing, and that the acts of Nicholson in the premises, after the expiration of the two years, were without effect.

I therefore hold that in the case presented the applicant is not entitled to allowance of letters patent.

I do not deem myself called upon to pass upon the question whether a second application for renewal filed within two years after the allowance of the original application, but after the forfeiture of the first renewal application, would be without effect, or otherwise, as the facts of the case submitted do not present such a case.

In accordance with the rulings of learned predecessors (9 Opin., 82; *id.*, 421; 10 do., 220; and other cases), action is necessarily and properly limited to the actual case submitted.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

World's Columbian Commission.

WORLD'S COLUMBIAN COMMISSION.

Alaska is a Territory within the meaning of sections 2 and 3 of the act of April 25, 1890, chapter 156, and, as such, is entitled thereunder to be represented by two Commissioners in the World's Columbian Commission.

DEPARTMENT OF JUSTICE,

December 19, 1890.

SIR: Your communication of November 25 calling for a construction of certain clauses of sections 2 and 3 of the act of April 25, 1890, entitled "An act to provide for celebrating the four hundredth anniversary of the discovery of America," etc., is received.

The question presented is whether Alaska is entitled to be represented by commissioners under said sections 2 and 3 in the World's Columbian Commission.

These sections provide for commissioners from each State and Territory of the United States.

Is Alaska a Territory under these provisions?

Title XXIII of the Revised Statutes (pp. 325-346) relates to "The Territories" and consists of three chapters, the third containing "Provisions Relating to the Unorganized Territory of Alaska."

The provisions relate mainly to the extension of the customs laws of the United States, and to the management of the seal fisheries.

The ceded territory is spoken of as the "Territory of Alaska" and as "Alaska Territory."

This third chapter is mostly derived from the act of July 27, 1868 (15 Stat., 240). A marked difference in designation appears between the act and the revision.

Both refer to "the territory ceded to the United States by the Emperor of Russia."

The act of 1868 gives the President power to interfere with the importation and use of fire arms and distilled spirits "into and within the said Territory," while section 1955, Revised Statutes, adopts precisely the same words in giving the same power, except the last clause reads "into and within the Territory of Alaska." Other similar changes also appear.

World's Columbian Commission.

The act of 1868 speaks of the "district of Alaska," but neither in its title or elsewhere does it speak of the "Territory of Alaska," unorganized or otherwise.

The act of May 17, 1884 (23 Stat., 24), entitled "An act providing a civil government for Alaska," enacts that "the territory ceded * * * shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided."

A governor, attorney, judge, marshal, and clerk, to be appointed by the President and confirmed by the Senate, are duly authorized, and a "seat of government" is named.

The general laws of the State of Oregon are made the laws of the district so far as applicable; and the Attorney-General is directed to compile laws of the United States applicable, and "furnish for the use of the officers of said Territory."

It is directed that there shall be no legislative assembly in said district, and that no delegate shall be sent to Congress therefrom.

A "report upon the condition of the Indians residing in said Territory," and other matters, by a commission, is directed, and it is also enacted, "That the Secretary of the Interior shall make needful and proper provision for the education of the children of school age in the Territory of Alaska." * * *

It is also provided that the provisions of chapter 3, title 23, Revised Statutes, before referred to, "relating to the unorganized Territory of Alaska, shall remain in full force, except as herein specifically otherwise provided."

In the year 1883 (22 Stat., 548) and previously, Alaska is not classified with the Territories in the "legislative, executive, and judicial" appropriation bills, but in that of July 7, 1884 (23 Stat., 177-179), under the general heading of "Government in the Territories," the "Territory of Alaska" is placed at the end of the list.

In that of March 3, 1885 (23 Stat., 408), under the same general head, the "Territory of Alaska" is given its alphabetical order, and is placed first in this list of the Territories.

The Congress which passed the act authorizing the Columbian Exposition, in its legislative, judicial, and appropriation bill of July 11, 1890 (Stat. Fifty-first Congress, first session,

World's Columbian Commission.

p. 249), makes use of the same words and arrangement, providing salaries, \$22,000, and "for incidental and contingent expenses of the Territory" * * * \$2,000.

In the sundry civil bill of said year, August 30, 1890 (same Stat., p. 303), there is appropriated "for the industrial and primary education of the children of school age in the Territory of Alaska, without reference to race, fifty thousand dollars."

In the deficiency bill of the same year a similar designation of Alaska as a Territory appears. (Same Stat., 541, 547.)

This unrestricted statutory designation of Alaska as a Territory has a reflected light thrown upon it by the fact that this Congress in designating the Indian Territory in the Oklahoma act, says that the same "shall, for the purposes of this act, be known as the Indian Territory." (Same Stat., sec. 29, p. 93).

In view of the legislation referred to I am led to conclude that the Revised Statutes changed the pre existing designation of Alaska and placed it in the list of Territories, but left it in an unorganized condition; that the act of May 14, 1844, incorporated this territorial domain into land, judicial, and civil districts, and provided a limited Territorial government which authorized its recognition as one of the Territories of the United States; that as Congress omitted to limit action under sections 2 and 3 of the Columbian Exposition law to Territories entitled to representation by a Delegate in Congress, as might have been done readily if such a purpose had existed, but on the contrary has recognized, classified, and designated Alaska as a Territory in subsequent legislation, it must be held that Congress intended to permit the representation in question and that Alaska is entitled to commissioners in the World's Columbian Commission.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF STATE.

World's Columbian Exposition.

WORLD'S COLUMBIAN EXPOSITION.

The power given the President by section 16 of the act of April 25, 1890, chapter 156, to "designate additional articles for exhibition," is not limited to articles belonging to the Executive Departments and institutions therein mentioned, but extends to such other articles as he may deem fit and proper to be designated; and this power carries with it authority to employ such persons as shall be necessary to properly prepare and care for the articles which may be thus designated.

DEPARTMENT OF JUSTICE,

December 22, 1890.

SIR: Your letter of the 17th instant requesting my opinion upon questions arising under sections 16 and 18 of the act of April 25, 1890, entitled "An act to provide for celebrating the four hundredth anniversary of the discovery of America," etc., has received due consideration.

The principal question presented is whether under the provisions of said sections the President is authorized to "designate additional articles for exhibition" not existing in any of the Executive Departments, and to employ persons outside of the Departmental force to prepare and care for such articles as may be so designated for exhibition.

Section 16 provides for an exhibit by the Government.

"There are to be taken from the Executive Departments, the Smithsonian Institution, the Fish Commission, and the National Museum" such "articles and materials as illustrate," etc.; and the board of management is provided for and is "to be charged with the selection, preparation, arrangement, safe keeping, and exhibition of such articles and materials as the heads of the several Departments and the directors of the Smithsonian Institution and National Museum may respectively decide shall be embraced in said Government exhibit." It is further provided that—

"The President may also designate additional articles for exhibition."

In view of the magnitude and importance of the proposed "World's Columbian Exposition," and of the independent and specific authority granted to the President, it is improbable that Congress intended to limit the action of the Executive to merely supplementing the selections of the heads of

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Departments and said directors, in a field where their own right to select is unrestricted.

I am therefore of the opinion that the power vested in the President includes, but extends beyond, the Departments and the institutions named, and that he is authorized to designate such "additional articles for exhibition" outside of any Department as he may deem fit and proper.

This grant of authority carries with it the power to employ such persons as shall be necessary to properly prepare and care for the articles so designated.

A further inquiry is made as to whether the President may, under circumstances suggested, apportion the moneys referred to in the concluding clause of section 18.

The act does not impose the duty of an apportionment or a division of the moneys upon the President, and I do not deem it advisable at this time to determine what rights the President may possess in the premises in virtue of his general executive authority.

It is probable that the attention of Congress should be called to the question of the division and application of the moneys to be appropriated, so that such legislative action may be had as Congress shall decide to be proper.

Very respectfully,

W. H. H. MILLER.

The SECRETARY OF THE TREASURY.

ENTRY OF PUBLIC LANDS.

The provision in the act of August 30, 1890, chapter 837, declaring that "no person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate under all of said laws," does not operate upon entries made prior to the date of the act.

An applicant who, by such prior entries, has already acquired title to 320 acres is not thereby precluded from acquiring title to an additional quantity, not exceeding 320 acres, by homestead entry, timber-land, or other claim under the land laws, filed subsequent to the date of the act.

DEPARTMENT OF JUSTICE,

December 26, 1890.

SIR: By letter of the 22d ultimo you submitted for the opinion of the Attorney-General the question whether in

Entry of Public Lands.

construing the act of Congress approved August 30, 1890, an applicant who shows that he has title to 320 acres of land under the land laws of the United States previous to said August 30, 1890, can now initiate claims for and acquire title to 320 acres more; or, in other words, whether if a person perfected title to a pre-emption and timber-land claim of 160 acres each prior to August 30, 1890, he can now file a homestead entry, or other claim, for 160 acres each, and acquire title thereto.

The provision in the act of August 30, 1890 (Laws first session 1890, chap. 837, p. 391, Annual Laws), which gives rise to this question is as follows:

"No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act."

The question asked must be answered in the affirmative.

The language of the provision will permit no other construction. Its whole operation is prospective. The entries upon which the limitation is to operate are those made after the act. Those made before the act, though uncompleted, are expressly saved from the operation of the act by the proviso. The verbs used are all of the future tense. "No person who *shall* after the passage of this act enter, etc., *shall be* permitted to acquire more than three hundred and twenty acres in the aggregate." The acquisition referred to clearly begins in the future. It is difficult to see why the limit upon such acquisition, in the absence of anything to the contrary, should not therefore be calculated from and after the passage of the act.

Add to the force of the language of the act that of the well known rule of construction which requires that in the absence of express provision or necessary implication to the contrary, all statutes are to be given a prospective rather than a retro-

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spective operation, and the proper view of the provision under discussion is placed beyond doubt.

The papers inclosed in your letter are herewith returned.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved:

W. H. H. MILLER.

COLLECTION OF HEAD-MONEY DUTY.

The act of August 3, 1882, chapter 376, known as the immigration act, confers power on the collector of customs, under proper regulations of the Secretary of the Treasury, to require the master of a vessel arriving within his collection district from a foreign country to detain all passengers on such vessel until they shall have been examined by the customs officers, for the purpose of determining the amount of head money collectible under that act from the master.

Section 3 of said act invests the Secretary of the Treasury with power to make all necessary regulations for carrying out its provisions; and under this power he may, by regulation, forbid the landing by the master of any passenger from his vessel until an examination of all the passengers thereon is had, whether cabin or steerage.

Detention of passengers for purposes of quarantine or tax charge is clearly within the power and duty of the master, where it is required of him by law, or by regulation pursuant to law.

Provisions of section 9, of the act of August 2, 1882, chapter 374, called the passenger act, considered and construed in connection with the same subject.

DEPARTMENT OF JUSTICE,
December 29, 1890.

SIR: By letter of the 14th of October, 1890, you requested the opinion of the Attorney-General as to the power of the officers of the customs to require the master of a ship arriving at the port of New York from a foreign country to detain all passengers upon such ship until they shall have been examined by the customs officers for the purpose of determining what amount of head-money, under the immigration act of 1882 (22 Stat., 214), should be collected from the master.

You first ask whether such power is conferred by section 9 of the passenger act (22 Stat., 186), which provides that—

Collection of Head-money Duty.

"It shall not be lawful for the master of any such steamship or other vessel, not in distress, after the arrival of the vessel within any collection district of the United States, to allow any person or persons, except a pilot, officer of the customs, or health officer, agents of the vessel, and consuls, to come on board of the vessel, or to leave the vessel, until the vessel has been taken in charge by an officer of the customs, nor after charge so taken, without leave of such officer, until all the passengers, with their baggage, have been duly landed from the vessel."

By the same section the master is required to furnish a list of all the passengers on board, with their citizenship. The calculation of head-money, under the immigration act, is in practice based on this list (*Head-money cases*, 112 U. S. R., 530-531).

I am of the opinion that section 9 is an express requirement that the master of any vessel therein referred to shall detain on board every passenger until permission is given to the master by the customs officers to allow him to land. It has been contended that the words "any person or persons" can not refer to passengers, on the ground that by substituting for "person or persons" "passengers," the result is that no passenger can leave the ship until all the passengers with their baggage have been duly landed—a result evidently absurd. When, however, proper effect is given to the words "without the leave of the customs officers," the absurdity is removed; for the clear meaning then is that the leave of the customs officer shall be necessary to the lawful landing of anyone, whether passenger or not, until *by such leave* all the passengers have been landed. It was thereby intended to put the ship, with all its passengers and all the persons on board, under the control of the customs officers, by requiring the master to detain everyone on board until such examination is had as is necessary to determine whether the customs and immigration laws had been complied with, and this is notified to the master by the customs officers. By section 11 of the passenger act it is made the duty of the collector to direct an inspector, or other officer of the customs, to compare the number of steerage passengers found on board with the list of such passengers furnished by the master, and

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to make a report of the same to the surveyor. It would be impossible to make such a comparison, unless after the arrival of the vessel the steerage passengers could be held on board until they had been personally examined or inspected. It is true that this affects only steerage passengers, and passengers other than cabin passengers. Section 9 is not so limited, however. The expression there is "any person or persons," and the time fixed for a free passage from the vessel to the shore and back again, without leave of the customs officers, is after "all the passengers," that is, both immigrant and cabin passengers, have been landed, with their baggage. It should be said that the passenger act of 1882 refers to such steamships and sailing vessels as carry steerage passengers, and that the application of section 9 would seem to be limited, therefore, to such ships, and would not extend to those carrying cabin passengers only.

But, whatever the application of section 9 of the passenger act, the terms of the immigration act of 1882 necessarily confer a power on the collector, under proper regulations of the Secretary of the Treasury, to require the master to detain all his passengers until they can be examined. The duty imposed by the immigration act on the collector of customs to collect a tax upon all citizens of foreign countries landing at a port in this country, from the master of the ship or the shipowner, implies the power in such collector to take the means necessary to determine what persons on board an incoming vessel are subject to the tax. It would obviously be impossible to determine the amount of tax due without subjecting all the passengers to an examination as to their citizenship, unless it is to be held that the list furnished by the master is conclusive upon the officers of the Government as to the number of foreign citizens on board the ship. The act contains no such provision, and, in the absence of it, the conclusiveness of the list is not to be presumed. By section 3 of the act the Secretary of the Treasury is given power to make all necessary regulations for carrying out its provisions. He may therefore make a regulation that no passenger shall be landed by a master of a ship until an examination of all the passengers may be had.

The immigration act makes no distinction between cabin

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and other than cabin passengers. The tax is to be imposed upon all citizens of foreign countries in any vessel landing at any port of the United States from any foreign port. It is manifest that such passengers do not always travel in the steerage. Any regulation looking to a personal examination of the passengers for the purpose of determining whether they are citizens of a foreign country ought therefore properly to include those in the cabin as well as those in the steerage.

Some argument seems to have been made by the collector and surveyor of the port of New York against the views here taken, on the ground that this construction of the passenger and immigration acts will result in an abridgment of the liberty of the citizen. The liberty of the citizen will be no more abridged by such a regulation than is his right of property by detention of it for customs examination. While the passenger is on the ship he is subject to the authority of the master, who may restrain him if he refuses to submit to the necessary discipline of the ship. (*Kay's Law Relating to Shipmasters and Seamen*, Vol. II, pages 815-818). It needs no argument to show that regulations for landing passengers are a part of the necessary discipline of the ship, and that a detention for purposes of quarantine or tax charge is clearly within the power of the master if it is required of him by law or lawful regulation. The power of Congress to prescribe the conditions under which foreigners may enter this country is plenary, because it has the power of absolutely excluding them. (*Chinese Exclusion cases*, 130 U. S. R., 531). The existence of such a power implies the ancillary power of detaining all persons, whether they are citizens of the United States or not, a reasonable length of time until their citizenship may be established.

The papers inclosed with your letter are herewith inclosed as requested.

Very respectfully,

WM. H. TAFT,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved:

W. H. H. MILLER.

Timber Unlawfully Cut on Indian Lands.

TIMBER UNLAWFULLY CUT ON INDIAN LANDS.

Where a large quantity of standing timber (about 4,000,000 feet) was unlawfully cut by trespassers on the Fond du Lac Indian Reservation, in Minnesota, and left lying thereon—the land from which the timber was cut being held in common by the Indian bands for whom it was reserved by the ordinary Indian title: *Advised*, (1) that the United States have the absolute ownership of the timber thus cut; (2) that the Indians have no interest therein whatever, and that it in no way appertains to the Indian Bureau or its agents to assume charge thereof; (3) that such timber may be sold for and on account of the United States, but that the sale should be made by the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior.

Opinion of Acting Attorney-General Jenks, of August 23, 1886 (18 Opin., 434), concurred in.

DEPARTMENT OF JUSTICE,
December 31, 1890.

SIR: It appears by the communication of the Commissioner of Indian Affairs dated September 23, 1890, accompanying your communication of October 17, 1890, that certain persons have unlawfully cut some 4,000,000 feet of timber standing on the Fond du Lac Indian Reservation situate in the State of Minnesota, and an opinion is requested upon the following questions arising out of that wrong:

(1) "Can the Indian agent at the La Pointe Agency, to which agency the Fond du Lac Reservation is attached, under instructions from the Indian Office or Department of the Interior, dispose of and give a valid title to the timber cut on the Fond du Lac Reservation as above stated, and now lying in the woods on said reservation, and not embraced in any suits now pending in the courts between the United States and the parties who cut the same ?

(2) "Should the proceeds of such sale (if the same be allowable) be treated as belonging to the Indians occupying the reservation, or to the United States?"

The rights of the Fond du Lac Indians in the reservation are defined by articles 2 and 3 of the treaty between the United States and the Chippewa Indians of the Mississippi and Lake Superior, proclaimed January 29, 1853 (Revised Indian Treaties, p. 224).

Timber Unlawfully Cut on Indian Lands.

Article 2 sets apart several reservations for various bands of the Chippewas of Lake Superior, and sets out with the following declaration, "The United States agree to set apart and withhold from sale for the Chippewas of Lake Superior the following described tracts of land," being part of the territory ceded by the Chippewas to the United States.

Paragraph 4 of that article defines the boundaries of the reservation set apart for the Fond du Lac bands, and article 3 is in the following words :

"The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

It does not appear that the timber in question was cut from land which had been set apart by the President to any "head of a family or single person over twenty-one years of age," and I am therefore to assume that the land from which the timber was cut was land held in common by the bands for which it was reserved. In other words, I am to assume that the title of these Indians was the ordinary ususfructuary Indian title, the mere right to use and enjoy the land as occupants; for I can not see that the United States, in

Timber Unlawfully Cut on Indian Lands.

agreeing to hold the reservation for the use of these Indians, meant to do anything more than give them the usual rights of Indians on reservations as to lands occupied and enjoyed by them in common as tribes. In my judgment, it would be doing violence to the language of the treaty to make more out of it than this.

The Supreme Court has held that the Indians have no greater rights to timber standing on their lands than an ordinary tenant for life has, and, therefore, that they have no authority to fell timber for the mere purpose of selling it, although they might do so for the purpose of using it, in a proper way, on the land, or for the purpose of opening land to cultivation, in good faith, and that, in case of an unauthorized cutting of timber, the United States has, at once, the right to appropriate to itself the timber thus cut (*United States v. Cook*, 19 Wall., 591.) This right of the United States follows from the established principle that the fee of the Indian lands is vested in the United States, subject to an occupation which may be said to be for the life of the several Indian tribes, and which is to cease when the tribes shall cease, respectively, whether by extinction or by abandonment of the tribal condition by the individuals composing them.

The Supreme Court having decided in *United States v. Cook* (*supra*) that the respective rights of the United States and the Indians to timber standing on the Indian lands are precisely the same as those of a reversioner or remainderman in fee and a life tenant, respectively, to timber growing on land subject to those estates, the question under consideration may be disposed of by the application of well-settled principles.

It is true that in the case of *United States v. Cook* (*supra*) the timber was cut by the Indians occupying the land from which the timber was severed, while in the case before me the felling of the timber was the act of unauthorized white men. In either case, however, it is, in contemplation of law, waste attributable to the occupying Indians, for such is the law with regard to timber cut by a life tenant or by third parties who entered as trespassers on the land subject to his

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life estate. It is no answer to say that the cutting was done through the connivance of the Indian agent, whose duty it was to prevent it, because it is well settled that the Government is not to suffer through the negligence or wrongs of its officers. (*Minturn v. United States*, 106 U. S. R., 444 and cases cited; *Moffatt v. United States*, 112 U. S. R., 24.)

That the United States, standing, as it does, in the relation of a reversioner in fee to the Indian occupants, has the same right to appropriate to itself immediately timber cut down on Indian land by whole trespassers, as it has to appropriate such timber when felled without authority by the Indians themselves, would seem to be beyond doubt.

The law on this subject is thus stated by the lord chancellor in *Bewick v. Whitfield* (3 P. Wms., 268): "The timber, while standing, is part of the inheritance; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser, and by wrong, it belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate."

A few additional authorities may be cited to the same effect: *Berry v. Heard*, Cro. Car., 242; *Richardson v. Yorke*, 14 Me., 216; *Bulkley v. Dolbeare*, 7 Conn., 232; *Mooers v. Wait*, 3 Wend., 104; *Lane v. Thompson*, 43 N. H., 324; *Lewis Bowles's Case*, 11 Co., 81; *S. C. Tudor's Real Property and Conveyancing Cases*, p. 93, note; *Shult v. Barker*, 12 S. & R., 272; Washb. *Real Prop.*, vol. 1, p. 139 [120]. See also an opinion of Attorney-General Garland, dated November 20, 1888.

Having shown that the timber in question is the absolute property of the United States, I proceed now to consider the first question, which is, substantially, whether the Indian agent at the La Pointe Agency, to which agency the Fond du Lac Reservation is attached, can, under instructions from the Indian Office or Department of the Interior, dispose of and give a valid title to the timber in question.

It was held by Acting Attorney-General Jenks (18 Opin., 434) that timber unlawfully cut from public lands in Montana Territory might be lawfully sold, at public or private sale, by the Commissioner of the General Land Office acting under

Timber Unlawfully Cut on Indian Lands.

the supervision of the Secretary of the Interior, and that the authority to sell such timber necessarily followed from the power over the public lands given those officers by section 453 of the Revised Statutes.

Concurring, as I do, in those conclusions and the reasoning supporting them, I am of opinion that the timber now in question may be sold, but that the sale should be made by the Commissioner of the General Land Office under the supervision of the Secretary of the Interior.

The timber having been cut on lands which are none the less public because incumbered by the Indian right of occupancy, its preservation and sale would seem to belong to the Commissioner of the General Land Office, who is required to perform, under the direction of the Secretary of the Interior, all executive duties "*in any wise respecting*" the public lands (R. S., sec. 453). Indeed, Congress has removed all doubt on the subject by repeatedly recognizing the authority of the Secretary of the Interior, through the General Land Office, to seize timber unlawfully cut on the public lands, by appropriate means to pay the agents employed from time to time to make such seizures (*Wells v. Nickles*, 104, U. S. R., 447).

It sufficiently appears, therefore, that the Indians have no interest in this timber, and that it in no way appertains to the Indian Bureau or its agents to assume charge of the same.

The second question is answered already; it being clear, if the above reasoning is sound, that the proceeds of the timber, when sold, will belong to the Government absolutely.

This, I think, disposes of both questions.

Very respectfully yours,

W. H. H. MILLER.

The SECRETARY OF THE INTERIOR.

INDEX.

ACCOUNTS AND ACCOUNTING OFFICERS.

1. The adjustment of accounts for expenditures of the Post-Office Department under the legislative, executive, and judicial appropriation bill can be done by such accounting officers in the Treasury Department as the Secretary of the Treasury may assign to that duty. It is not required by statute to be performed by the Sixth Auditor. 30.
2. The Secretary of the Treasury can not legally, by departmental order, change a practice or course of office prescribed by statute for the settlement of accounts. 177.
3. A person to whom a pension certificate was granted as the widow of a soldier in the war of the rebellion was also granted a pension certificate as the widow of a soldier in the war of 1812, and drew pensions upon both certificates from March 9, 1878, to December 3, 1883. The Commissioner of Pensions, on discovering this, required her to make an election, and she having elected to hold the first-mentioned certificate, he ordered the amount which had been paid to her upon the other certificate to be withheld in installments of \$6 per month from payments thereafter, and issued an order to the pension agent accordingly: *Advised* that the order made in this case, being within the general jurisdiction of the Commissioner, is obligatory on the pension agent, and that the accounting officers of the Treasury have no power to disallow payments made by the agent pursuant thereto. 214.
4. It is not within the province of the accounting officers of the Treasury, upon learning of any order made by the Commissioner of Pensions to a pension agent for the payment of pensions, to notify such agent of what their decision will be upon his account when rendered. 215.
5. The payment of accounts of land-grant railroads (i. e., such as have not received aid in Government bonds) for Army transportation, under the appropriation act of September 22, 1888, chapter 1027, is not controlled by the *proviso* in the acts of June 30, 1882, chapter 250, and August 5, 1882, chapter 390, but is governed by the provisions of the act of 1888 alone; and under these provisions such accounts can be lawfully paid by a quartermaster without previous action thereon by the accounting officers of the Treasury. 264.
6. The Secretary of the Treasury has power, under section 161, Revised Statutes, to make a regulation which prescribes that the

ACCOUNTS AND ACCOUNTING OFFICERS—Continued.

- oaths to be taken by an officer of the Revenue Marine Service, or an officer or employé in any branch of the customs service, to the correctness of his account for pay or salary, as required by sections 1790 and 2693, Revised Statutes, shall be taken before some person authorized to administer oaths generally. 401.
- 7. The fee paid by the officer or employé in such case for administering the oath does not constitute a proper charge against the United States, and if charged in his account should not be allowed in the settlement thereof. *Ibid.*
- 8. P. served as a cadet at the Military Academy from July 1, 1865, to June 15, 1869, when he was appointed a second lieutenant, and has ever since served as a commissioned officer in the Army. In February, 1884, he presented a claim for increased longevity pay under any law allowing credit for cadet service, and by settlements made in April, 1885, he was allowed an increase commencing from February 24, 1881, on a construction of law since declared by the Supreme Court, in the case of *United States v. Watson* (130 U. S., 80), to be erroneous. After the decision in that case (March 11, 1889) he filed a claim for longevity pay due under said decision: *Held* that the settlements made in April, 1885, can not be reopened upon the ground that they proceeded on a mistaken view of the legislation governing the subject involved. 439.
- 9. The first clause of section 3622, Revised Statutes, which requires the rendition of accounts monthly, is applicable to every officer who receives advances of public money to be disbursed, and also to every officer who collects and receives fees and revenues which it is his duty to account for. 557.
- 10. The requirement that officers render their accounts monthly is not subject to the direction of the Secretary of the Treasury, excepting in extraordinary cases, where he shall be of opinion that the statutory period ought to be enlarged to meet the special circumstances of such cases. Opinion of Attorney-General Devens of December 2, 1878 (1 C Opin., 222), concurred in. *Ibid.*
- 11. The accounting officers of the Treasury should allow a paymaster of the Army credit for payment to a soldier of his retained pay under section 1281, Revised Statutes, where the latter has received an honorable discharge, although it may appear that after enlisting the soldier deserted, but was restored to duty without trial and served out the full term of his enlistment. 567.

ACCRUED PENSION.

See **PENSION**, 1, 2, 6, 7.

AD INTERIM APPOINTMENT.

See **APPOINTMENT**, 6.

ADJUSTMENT OF RAILROAD LAND-GRANTS.

See **RAILROAD LAND-GRANTS, ADJUSTMENT OF**.

ADMINISTRATOR.

Where a resident on the naval reservation at Pensacola, Fla., died intestate, possessed of certain property, which is in the hands of the commandant of the yard: *Advised* that the local probate court of the State may properly exercise jurisdiction over the case, and that on the appointment thereby of an administrator of the estate of the deceased the property in the hands of the commandant belonging to such estate should be turned over to the administrator. 176.

See JURISDICTION.

ADMIRAL'S SECRETARY.

See APPOINTMENT, 9.

ADVERTISEMENT.

Section 853, Revised Statutes, is superseded by the act of June 20, 1877, chapter 359, as regards the payment for advertisements by the several Departments of the Government. 59.

See CONTRACT, 3, 4; STATUTES, INTERPRETATION OF, 4.

ALASKA.

1. The laws relating to national banking associations are by virtue of the act of May 18, 1884, chapter 53, in force in the Territory of Alaska, and such associations may be lawfully organized in that Territory. 678.
2. Alaska is a Territory within the meaning of sections 2 and 3 of the act of April 25, 1890, chapter 156, and, as such, is entitled thereunder to be represented by two Commissioners in the World's Columbian Commission. 700.

ALIENS.

1. The provisions of the act of March 3, 1887, chapter 340, forbidding aliens who have not declared their intention to become citizens, and alien corporations, to acquire, hold, or own real estate in the Territories, etc., apply to mines, these being real estate. 26.
2. But stock in a corporation is personality, and consistently with those provisions an alien may hold shares of stock issued by an American corporation owning mineral lands in the Territories; yet where the holding by aliens exceeds 20 per cent. of its stock, such corporation can neither own nor hold hereafter-acquired real estate while such holding by aliens in excess of 20 per cent. continues. *Ibid.*
3. So an alien may hereafter advance money for the purpose of developing mining property in the Territories; but he can not thereby acquire any interest in such real estate. *Ibid.*
4. An alien may lawfully contract with an American owner to work mines by a personal contract, contract for hire, or a bona fide lease for a reasonable time.. *Ibid.*

ALLOTMENT AND ALLOTTEE.

See INDIANS AND INDIAN LANDS, 1, 11, 13, 15, 16, 17, 21, 22, 23, 24.

ALTERATION OF LICENSE.

See STEAM ENGINEERS, 2.

AMERICAN SURETY COMPANY OF NEW YORK.

See SURETY, 2.

APPEAL.

The consideration and determination of appeals to the Secretary of the Interior from the Commissioner of the General Land Office may be made by the Assistant Secretary of the Interior, under a regulation prescribed by the Secretary, pursuant to section 439, Revised Statutes. 133.

APPOINTMENT.

1. A vacancy in an office which happens during a session of the Senate, but remains unfilled until a recess of the Senate occurs, may be filled by the President during such recess by a temporary appointment. 261.
2. The rule is the same in the case of a new office, which is not filled during the session in which it was created. The President may fill the original vacancy existing therein by a temporary appointment made during the recess of the Senate. *Ibid.*
3. A retired officer of the Army is not ineligible to hold an appointment to a civil office. 283.
4. By section 1754, Revised Statutes, it is made the duty of those making appointments to civil offices to give a preference, other things being equal, to the class of persons named in that section; but the matter of capacity and personal fitness for the place is for the determination of the appointing power. 318.
5. T. was appointed a railway postal clerk by the Postmaster-General on April 29, 1889, without having undergone a civil-service examination (none being then required for such appointment), but he did not take the oath of office and enter upon its duties until May 18, 1889. In the mean time, namely, on May 1, 1889, civil-service rules for the Railway Mail Service went into effect, requiring an examination thereunder as a preliminary to making an appointment like the above: *Held* that T. was legally appointed on April 29; that his appointment was complete on that date, although he did not qualify by taking the oath of office until afterwards; and that no examination under the civil-service rules was required in his case. 410.
6. The vacancy in the office of Paymaster-General, created by the retirement of General William B. Rochester, may be filled by an *ad interim* appointment under the provisions of section 179, Revised Statutes. 500.
7. Upon the facts submitted: *Advised* that the appointment of certain railway transfer clerks, who had not been examined and certi-

APPOINTMENT—Continued.

- fied for appointment by the Civil Service Commission, was not within the amendment of clause 5 of Railway Rule II, adopted August 19, 1889, which excepts from examination clerks in the Railway Mail Service who are "employed exclusively as porters in handling mail matter in bulk, in sacks, or pouches, and not otherwise." 583.
8. Section 1019 of the Postal Regulations (edition of 1887) can not prevail over, but must yield to the subsequently adopted amendment of said clause 5, which should be strictly confined to the class of transfer clerks therein mentioned. *Ibid.*
9. The appointment of the secretary allowed the Admiral of the Navy by section 1367, Revised Statutes, does not belong to the President, with the advice and consent of the Senate, but devolves upon the Admiral as one personal to himself; and the contemporaneous construction of the statute and uniform practice thereunder by the executive branch of the Government have accorded with this view. 589.
10. There is no statutory provision authorizing the appointment of more than one deputy surveyor of customs, at the same time, at each of the ports named in section 2722, Revised Statutes. 629.
11. An applicant for appointment as an inspector of boilers, under section 4415, Revised Statutes, should have not only the technical knowledge, but the actual professional experience of a practical engineer on a steam-vessel. 632.

APPRAISEMENT OF DUTIABLE MERCHANDISE.

See CUSTOMS LAWS, 29.

ARENAS KEY ISLAND.

See JURISDICTION, 2.

ARIZONA TERRITORY.

See TERRITORIES, 1, 3, 4, 6.

ARMAMENT OF NAVAL VESSELS.

See NAVY, 5.

ARMS, DISTRIBUTION OF.

See MILITIA.

ARMY.

1. L., a major in the Seventh Infantry, was, by direction of the President, dropped from the rolls of the Army November 25, 1861, and W., a captain in the Fourth Infantry, was with the advice and consent of the Senate appointed major in the Seventh Infantry, *vice* L., dropped. Afterwards, on November 27, 1866, the President revoked the order dropping L., and directed that he be restored to his former commission to fill a vacancy of major in the Eighteenth Infantry, to date from July 28, 1866, and at

ARMY—Continued.

- the same time, by direction of the President, L. was placed on the retired list as major: *Advised* that the action of the President on the 27th of November, 1866, was ineffectual to restore L. to the Army and place him on the retired list, and that he is not entitled to be borne thereon. 202.
2. S., a captain in the Seventh Infantry, was summarily dismissed the service by direction of the President July 15, 1863, and notified thereof. Afterwards, on August 11, 1863, the order of dismissal was revoked; whereupon S. (the vacancy not having been filled in the mean time) returned to the position from which he was dismissed and continued to serve therein until December 30, 1864, when, upon the finding of a retiring board, he was retired under the provisions of the act of August 3, 1861: *Advised* that the dismissal of July 15, 1863, created a vacancy which could not otherwise be filled than by an appointment with the advice and consent of the Senate; that the subsequent revocation of that order on the 11th of August, 1863, was ineffectual to restore S. to his former position in the Army; that when, afterwards, he was put on the retired list he was not a commissioned officer of the Army, and therefore ineligible to a place thereon; and that, accordingly, he is not entitled to be borne on such list. 203.
3. L., a first lieutenant in the Seventh Infantry, having been found by a retiring board "incapacitated for active service from insanity, which insanity is not incident to the service," was, by direction of the President, retired July 31, 1868, on pay proper alone under the act of August 3, 1861. At L.'s request the order of retirement was, by direction of the President, on June 23, 1869, so amended as to wholly retire him from the service with one year's pay and allowances. On April 2, 1878, by direction of the President, the order of June 23, 1869, was declared void, on the ground that L. was insane when he requested it; and he was restored to the retired list in accordance with the original order: *Advised* that after the President had once acted upon the finding of the retiring board, by placing L. on the retired list with pay proper alone, his power over the case was exhausted, and the subsequent order wholly retiring L. was void for want of authority thus to retire him; and that therefore L. is entitled to be borne on the retired list conformably to the order retiring him on pay proper alone. *Ibid.*
4. Under the act of February 14, 1889, chapter 166, S. was appointed from civil life to the position of major of engineers in the Army, and thereupon was placed on the retired list of the Army as of that grade: *Advised*, that he must take the oath required by section 1756, Revised Statutes, and that this act would be in law a legal acceptance of the office, and, as such, a sufficient formal acceptance. 283.
5. The provisions of sections 1259, 1763, 1764, and 1765, Revised Statutes, do not require the annulment of the appointment held by

ARMY—Continued.

- S. as agent in charge of river and harbor work at Wilmington, Del., and that he be relieved from that work. *Ibid.*
6. B., while a private soldier, received a certificate of merit from the President for distinguished services, which entitled him, under section 1285, Revised Statutes, to "additional pay at the rate of \$2 per month." He was discharged as such private soldier, and thereupon enlisted as a "general service messenger," agreeably to the provisions of the act of July 29, 1886, chapter 810: *Held*, that he is not entitled, as such general service messenger, in addition to the compensation provided for in that act, to the \$2 per month provided for in said section 1285. 471.
7. The detail of an officer of the Army to report to the president of the World's Columbian Commission, with a view to his assignment by the latter to the duties of an engineer in the preparation and construction of buildings, grounds, etc., for the Columbian Exposition, is within the prohibition of section 1224, Revised Statutes, provided that the performance of such duties require the officer to be separated from his company, regiment, or corps, or interfere with the discharge of his military duties. 600.
8. *Seemle* that where a leave of absence is asked by an army officer, for the very purpose of enabling him to undertake the employments prohibited by said section, the granting of such leave would be an evasion of the statute and be unwarranted. *Ibid.*
9. B., a first lieutenant in the the army, having been appointed assistant secretary of legation at London, accepted the appointment on May 19, 1869, and entered upon the duties of the office on the 31st of same month. On the 25th of same month he was placed on the retired list as a captain, to date from May 18, 1869, on account of disability. He resigned the office of assistant secretary of legation December 6, 1869, and on April 2^d, 1870, was appointed consul-general at London, which office he held until September 16, 1881. His name was borne on the retired list continuously from the 25th of May, 1869, until May 7, 1878, when he was dropped from the Army, in conformity with an opinion of the Attorney-General, under section 1223, Revised Statutes. But his name was restored to the retired list July 3, 1878, by an order of the Secretary of War (on the assumption that his case was within the first proviso to section 2 of the act of March 3, 1875, chapter 178), and is still borne thereon: *Held* (1) that when B. accepted the appointment to and assumed the duties of secretary of legation at London he thereby, by force and effect of section 2 of the act of March 30, 1868, chapter 38, ceased to be an officer of the Army, and his place as such officer became vacant; (2) that neither the said act of March 3, 1875, nor the action of the Secretary of War above referred to, operated to reinstate him as such officer; and (3) that his name is not lawfully borne on the retired list of the Army. 609.
10. The act of March 30, 1868, applied to officers on the retired as well

ARMY—Continued.

as on the active list, and it made the acceptance of the diplomatic vacate the military office *eo instanti*; the vacancy thus created necessarily continuing until filled in the usual way. 610.

11. The act of March 3, 1875, should be construed to have a prospective effect only. *Ibid.*

ARREARS OF PENSIONS.

See **PENSION**, 3.

ARREST.

See **COURT-MARTIAL**, 2.

ASSIGNMENT.

See **CONTRACT**, 7.

ATTACHMENT.

Imported merchandise, while in the custody of the customs officers, is not subject to attachment at the suit of private parties; and those officers should pay no attention to process of that kind against such merchandise when served on them. 101.

ATTESTATION OF CONSUL.

See **CUSTOMS LAWS**, 27, 28.

ATTORNEY-GENERAL.

1. Where the question submitted by the head of a Department relates to duties of Territorial officers in a matter touching which such Department has no administrative concern, it is not deemed proper for the Attorney-General to give an official opinion thereon. 7.
2. The Attorney-General deems it inexpedient to express an opinion upon certain questions proposed, relating to a right of fishery in the Klamath River, California, claimed in behalf of the Klamath Indians; such questions being justiciable in the appropriate courts at the suit of the Indians themselves who are interested in them. 56.
3. Where, from an examination of the papers submitted, it appeared that the question proposed (which involved the construction of a statute) did not spring out of any case actually existing in the administration of the Department seeking advice, the Attorney-General deemed that it would be improper for him to give an official opinion thereon. 331.
4. Where numerous papers relating to a claim against the District of Columbia were referred by the Secretary of the Treasury to the Attorney-General with request for an opinion of the latter as to what action the Secretary should take in respect to the payment of the claim, in view of all the facts presented in the papers, but no statement of facts and no question of law were submitted by the Secretary, the Attorney-General declined to express any opinion in the matter as thus presented. 396.

ATTORNEY-GENERAL—Continued.

5. Where no actually existing case was presented, but the call apparently was for an opinion in advance as to what would in the future be held upon indefinite and varying facts, the Attorney-General returned the papers, declining to give an opinion on the matter submitted. 414.
6. The questions submitted (which relate to timber cut on Fond du Lac Indian Reservation) being unaccompanied by a statement of the facts upon which they arise, no opinion is expressed thereon. 465.
7. The question whether a bond taken by the collector of a port from one of his own subordinates, for his own protection, is valid in the absence of a statute authorizing it, not appearing to be a question in which the United States are concerned or one arising in the administration of a Department, the Attorney-General declines to give an official opinion thereon. 556.
8. It is not within the province of the Attorney-General to consider questions looking to changes in maritime law to be accomplished by treaty with foreign governments. 598.
9. It is deemed inexpedient by the Attorney-General, for reasons stated, to give an opinion upon the question whether an express company, in receiving from a lottery company letters and packages declared unavailable by section 3894, Revised Statutes, as amended by the act of September 19, 1890, chapter 908, and forwarding them along the ordinary mail routes, violates section 3982, Revised Statutes. 670.
10. Where the consideration of questions of law submitted for his opinion involved an examination of evidence and the settling of questions of fact, the Attorney-General declined to enter upon such examination for the reason that it did not fall within his province, and accordingly expressed no opinion on the questions submitted. 672.
11. The Attorney-General declines to give an opinion upon a question as to the meaning of a Territorial statute, where the question does not appear to have arisen in the administration of the Department proposing it. 695.
12. It is not within the province of the Attorney-General to make a finding of facts in a case submitted for his opinion upon questions of law arising thereon. The facts of the case should be ascertained and presented by the officer requesting the opinion. 696.

See COMPENSATION, 3.

AWARD IN FAVOR OF SAMUEL STRONG.

See PAYMENT, 4.

BATTERY ISLAND, MD.

Upon the facts presented touching the title to certain property at Battery Island, in the Susquehanna River, Maryland, occupied and used by the U. S. Fish Commission: Advised (1) that the

BATTERY ISLAND, MD.—Continued.

legal title to such of the made land as is contiguous to the island is in the riparian proprietor; (2) that the legal title to such of the made land as is not contiguous to the island, but lies separate therefrom, is in the State of Maryland, also the title to the soil on which the public works (cribs, breakwaters, etc.) are constructed; (3) that the United States have no title to any land within the lines of said works or upon the island, excepting the light-house site. 149.

BOND.

1. The Secretary of the Navy has power, under section 1363, Revised Statutes, to approve a pay-officer's bond in which the sureties are corporations, or a corporation joined with a natural person, if he deems such sureties sufficient. 175.
2. There is no law requiring a United States judge or a United States attorney to certify as to the sufficiency of guarantors or bondsmen offered in connection with proposals and contracts with the Navy Department, and no fees are chargeable against the Government for such service. 181.
3. The expense of obtaining a certificate from the officer must be borne by the bidder or contractor as other expenses are incurred by him in the proper execution of the papers. *Ibid.*
4. The provision in the act of June 30, 1890, chapter 639, entitled "An act making appropriations for the payment of invalid and other pensions," etc., requiring a new bond "from all pension agents now in office," is mandatory, and applies to all pension agents then in office, without any exception whatever. 581.

BONDS OF THE UNITED STATES.

1. The power given the Secretary of the Treasury by section 2 of the act of March 3, 1881, chapter 133, to purchase United States bonds with the surplus money in the Treasury not otherwise appropriated, does not include the payment of commissions to private parties to purchase for the Government. 279.
2. Only the market price of the bond at the time of the purchase should be paid; no commissions in addition to the par value of the bond and the premium thereon can be lawfully paid. *Ibid.*

BRIDGE.

1. The plans for the bridge authorized by the act of March 3, 1887, chapter 356, to be built across the Missouri River between the cities of Omaha and Council Bluffs, should not be approved by the Secretary of War unless they provide for a structure of sufficient strength to bear trains of cars drawn by locomotives. 29.
2. Provision in the act of March 2, 1889, chapter 411, making an appropriation "for repairs to draw-pier of the Rock Island Bridge," etc., considered with reference to the duty thereby devolved upon the Secretary of War concerning its expenditure.

BRIDGE—Continued.

and the further duty to require of the Chicago, Rock Island and Pacific Railroad Company reimbursement of one-half of the expenses incurred in said repairs. 375.

3. The bridge over the Muskingum River at Taylorsville, Ohio, is a nuisance to navigation which ought to be abated. 590.
4. The case of the county bridge over the Muskingum River at Taylorsville, Ohio, on which an opinion of the Attorney-General was given July 19, 1890 (*ante*, p. 599), distinguished from the case of the bridge of the Baltimore and Ohio Southwestern Railway Company across the same river at Marietta, Ohio, subsequently presented, and that opinion shown to be inapplicable to the latter case by reason of recent statutory amendments affecting it. 676.

BRIG "GENERAL ARMSTRONG."

See **CLAIMS**, 2.

BULLION.

See **EXCHANGE OF GOLD BARS FOR GOLD COIN**.

CAVEAT.

See **PATENTS FOR INVENTIONS**, 1, 2.

CENTRAL PACIFIC RAILROAD COMPANY.

See **CLAIMS OF THE UNITED STATES; SINKING FUND**.

CERTIFICATE FOR REINSTATEMENT.

See **CIVIL SERVICE**, 1, 4, 5.

CERTIFICATE OF SUFFICIENCY OF BONDSTHOLDERS.

See **BOND**, 2, 3.

CHICKAMAUGA AND CHATTANOOGA NATIONAL PARK.

The provisions of the act of August 19, 1890, chapter 806, entitled "An act to establish a National Military Park at the battle-field of Chickamauga," do not authorize the acquisition of the lands described therein, which are to constitute the proposed national park, in any other mode than by condemnation proceedings instituted under the act of August 1, 1883, chapter 728. 673.

CHINESE EXCLUSION.

See **CHINESE LABORERS**.

CHINESE LABORERS.

1. Opinion of Attorney-General Brewster, of December 26, 1882 (17 Opn., 483), touching the right of Chinese laborers to pass through the United States in the course of their journey to and from other countries, reaffirmed. 369.
2. The application of that opinion to the case presented is unaffected by the acts of July 5, 1884, chapter 220, and October 1, 1888, chapter 1064. *Ibid.*

CHINESE LABORERS—Continued.

3. The certificate required of Chinese by section 6 of the act of July 5, 1884, chapter 220, in order to establish a right to land in the United States, can not be dispensed with. It is the sole evidence admissible to establish such right. 510.

CHIRIQUI IMPROVEMENT COMPANY.

See CONTRACT, 1, 2.

CHOCTAW NATION, LAWS OF.

1. The seventh section of the Choctaw intermarriage act of November 9, 1875, is not inconsistent with the Constitution, laws, or treaties of the United States. 109.
2. That section is valid and binding on all citizens of the Choctaw Nation, but affects only their rights acquired under said act. *Ibid.*
3. The fact that a white man was divorced from his Indian wife, upon her petition, is evidence that he parted from her without just provocation, and brings the case within the provision of the Choctaw act of October, 1840, declaring that any white man parting from his wife without just provocation shall be deprived of citizenship. *Ibid.*
4. Claim of James Bragg to citizenship in the Choctaw Nation of Indians reconsidered; and advised that upon the record of the case as now made up he is entitled to such citizenship. Opinion of March 1, 1888 (*ante*, p. 109), cited. 179.

CITIZENSHIP IN THE CHEROKEE NATION.

1. Where a North Carolina Cherokee Indian removed into the Cherokee Nation and permanently located there subsequent to the date of the act of the Cherokee legislature of 1870, relating to the admission to citizenship in that nation of North Carolina Cherokees, and made proof as in said act is required, and was thereupon admitted to citizenship by the chief justice under its provisions, he thereby became fully invested with the rights, privileges, and immunities of Cherokee citizenship. 229.
2. The action of the chief justice, under the act, is final, and leaves nothing for review. *Ibid.*
3. The Interior Department is under no obligation to respect a later decision of the Cherokee authorities made pursuant to the order of a commission subsequently established. *Ibid.*

CITIZENSHIP IN THE CHOCTAW NATION.

See CHOCTAW NATION, LAWS OF.

CITIZENSHIP OF THE UNITED STATES.

See INDIANS AND INDIAN LANDS, 17.

CIVIL SERVICE COMMISSION.

See CIVIL SERVICE.

CIVIL SERVICE.

1. F., a clerk in the War Department, resigned June 30, 1883, and on November 2, 1888, was reappointed to a clerkship in the same Department on a certificate for reinstatement given by the Civil Service Commission under Departmental Rule X, but failing to avail himself of this opportunity to reënter the service, the last mentioned appointment was canceled January 28, 1889. On August 13, 1889, the Secretary of War requested that F. be again certified by the Commission for reinstatement, but the Commission on August 25, 1889, declined to issue a certificate, on the ground that he had been separated from the service more than a year, and was not eligible for reappointment under said rule: *Held* that the decision of the Commission, namely, that a second certificate for reappointment could not issue to F. because he had been separated from the service for more than a year, was in accordance with Rule X. 416.
2. Where one served in the war of the rebellion in the military organization known as "Quartermaster's Volunteers," or "Quartermaster's Brigade," and was honorably discharged from the service: *Held*, that he is entitled to the benefit of the proviso in Departmental Rule X of the civil service, as one who "served in the military service of the United States in the late war of the rebellion, and was honorably discharged therefrom," within the meaning of that rule. 434.
3. The proposed amendment of Departmental Rule VII, and revocation of Departmental Rule II, of the regulations of the Civil Service Commission (with a view to provide for the employment of substitutes for clerks, copyists, and other employés in the Departments, who are temporarily absent on account of sickness or other unavoidable cause, and for the selection of such substitutes from persons regularly certified by the Civil Service Commission), considered in connection with section 4 of the act of August 5, 1882, chapter 389, and section 4 of the act of March 3, 1883, chapter 128, and *advised* that while the amendment proposed is not beyond the power of this Commission, with the approval of the President, to make, yet that such amendment would be inoperative whenever it should become necessary to make an additional expenditure for the employment of the substitutes. 507.
4. A person who served as a contract surgeon, in the late war of the rebellion, with troops in the field and in hospitals, and by completing his contract was honorably discharged from the service, is within the *proviso* to Departmental Rule X of the Civil Service Rules and Regulations, and entitled to the benefits thereby conferred. 533.
5. H. served in the war of the rebellion in a New York regiment from May 12, 1861, to May 13, 1863, when he was honorably discharged. On the latter date he enlisted in the "general serv-

CIVIL SERVICE—Continued.

- ice" of the Army, for clerical duty at headquarters, and was transferred to the Adjutant-General's office April 1, 1864, in which he served on clerical duty until May 13, 1868, when he was discharged through no delinquency or misconduct on his part. Application being now made by him for reinstatement under amended Departmental Rule X of the Civil Service Regulations, the Secretary of War requests that he be certified by the Civil Service Commission for reinstatement as a clerk in the War Department under said rule: *Held* that H., during the period of his enlistment in the "general service" for clerical duty as above, was not in the classified departmental service, and that (he not having been separated from the latter service) his case does not come within the provisions of said Rule X, and therefore that he can not be certified thereunder. 552.
6. The words "departmental service" and "the service," as used in the *proviso* in that part of the legislative, executive, and judicial appropriation act of July 11, 1890, chap. 667, which relates to the Civil Service Commission, mean the classified civil service as established by section 163, Revised Statutes, and section 6 of the act of January 16, 1883, chapter 27. 624.
 7. The words in the same proviso, viz, "promotion or appointment in other branches of the Government," signify promotion or appointment in the classified service of some other Department than that to which the applicant may belong. *Ibid.*
 8. *Sembler* that an application for a transfer is not within the exception of the proviso. *Ibid.*
 9. Congress not having designated in the proviso any particular county officer or officers who may make the certificate required to accompany the application, this matter must be presumed to have been left as a subject for regulation by the Civil Service Commission. *Ibid.*

CLAIMS.

1. The crew of an American vessel, wrecked on the South Pacific Ocean, were supplied with necessary clothing by a United States consul, who, on learning that wages were due them, applied to the master of the vessel to pay for the clothing out of the wages due, which the latter did. On their arrival in the United States the crew brought suit against the owners of the wrecked vessel for their wages, and recovered a judgment therefor: *Advised*, that such owners have no valid claim against the United States for the money paid by the master, as above; that their remedy, if any they have, is against the consul and the sureties on his bond. 22.
2. Consideration of a claim presented by Mr. S. C. Reid, jr., on account of alleged advances made by him as agent and attorney for claimants, in the prosecution of the claim of the owners, officers, and crew of the brig *General Armstrong*. 32.

CLAIMS—Continued.

3. The State of Kansas is not entitled, under the third section of the act of January 29, 1861, chapter 20, to 5 per centum of the proceeds of the sales of the Indian lands in that State, which proceeds the United States, as a consideration for the extinguishment of the Indian title, agreed to receive, hold in trust, and pay over to the Indians. 117.
4. The provision in the act of March 2, 1889, chapter 410, for payment to the State of Kansas of \$43,790.32 on account of 5 per centum fund arising from the sale of public lands in said State, precludes all inquiry on the part of the accounting officers of the Treasury as to the legality and justness of the claim. It is their duty to allow and certify the claim for that amount, "as per decision of the First Comptroller of the Treasury of date May 6, 1880, and as stated by the Commissioner of the General Land Office." 362.
5. Where a resolution of the Senate (dated January 10, 1889) directed the Secretary of the Treasury "to reëxamine and audit the claim of the State of Pennsylvania for money expended in 1864, for which reimbursement was provided by act of April 12, 1886," and it appeared by that act the claim was required to be "examined and settled by the Secretary of War," by whom this duty had been discharged: *Held*, that the Secretary of the Treasury has not sufficient authority, under said resolution, to reëxamine the claim in such sense as would make of the reëxamination an audit, adjudication, or settlement thereof. 385.
6. A resolution of one House of Congress can not empower the head of a Department to reëxamine and audit a claim which by statute is required to be examined and settled by the head of another Department. *Ibid.*
7. By the act of March 3, 1875, chapter 130, it was provided that the money appropriated for the erection of the building for the Departments of State, War, and Navy should be expended under the direction of the Secretary of War; and in March, 1877, C. (then a lieutenant-colonel in the Corps of Engineers), by order of the Secretary of War, took charge of the construction of the building and continued in charge thereof until May 31, 1888, when the building was completed. From July 1, 1878, until May 31, 1888, by direction of the Secretary of War, C. disbursed the appropriations made from time to time for the building; and for this service he claims compensation at the rate of three-eighths of 1 per cent. upon the amount of money disbursed by him: *Held*, upon consideration of sections 1153 and 3654, Revised Statutes, and the act of March 3, 1875, chapter 131, that the claim is controlled by the provisions of section 1153, Revised Statutes, and is not allowable therunder. 425.
8. K., a regularly appointed weigher in the customs service, was, on April 4, 1889, suspended from duty and pay by the collector, under article 1371 of General Regulations of 1884, pending the action of the Secretary of the Treasury upon a recommendation

CLAIMS—Continued.

- of the collector for the removal of K. On May 23, 1889, the Secretary removed K., who received notice thereof on May 29, 1889. K. claims compensation as weigher for the period from April 4 to May 29. *Advised*, that payment of the claim be declined until it shall have been judicially determined that he is entitled thereto. 463.
9. The claim of the State of Massachusetts for reimbursement of expenses incurred in the payment of State militia called out by the governor, at the request of the military authorities of the United States, to aid in suppressing the "draft riots" in the city of Boston, is allowable under the provisions of the act of March 3, 1863, chapter 75, and the regulations prescribed by the President agreeably thereto, as an expense connected with the enrollment and draft authorized by that act. 537.
 10. This claim is also within the scope of the act of July 27, 1861, chapter 21, and the supplemental resolution of March 8, 1862 [No. 16], and may properly be examined and adjusted by the accounting officers of the Treasury under the provisions thereof. *Ibid.*
 11. The duty of the Secretary of War in the case of a claim under the act of March 3, 1885, chapter 335, is limited to the determination of whether the property for the loss of which indemnity is claimed was "reasonable, useful, necessary, and proper" for the claimant. 693.
 12. Whether the loss happened under the circumstances described in the statute, and comes within the provisions thereof, is a question for the determination of the proper accounting officers of the Treasury, and so does not appertain to the administration of the War Department. *Ibid.*

CLAIMS OF THE UNITED STATES.

The question considered whether, on the facts presented, an action could be maintained by the United States against the Union Pacific Railroad Company, the Central Pacific Railroad Company, and the Western Union Telegraph Company, to recover back certain moneys paid for the transmission of Government dispatches over the bonded lines of said railroad companies. 76.

CLASSIFICATION FOR DUTY.

See CUSTOMS LAWS, 2, 3, 5, 6, 12, 13, 14, 17.

CŒUR D'ALENE INDIAN RESERVATION.

See WASHINGTON AND IDAHO RAILROAD COMPANY.

COINS OF THE UNITED STATES.

The provisions of section 3510, Revised Statutes, do not authorize the Director of the Mint, with the approval of the Secretary of the Treasury, to accept and pay for new designs for *existing coins*. His authority thereunder, as regards the preparation of original dies, is limited to those intended for new coins. 16.

COLLECTION OF DUTIES.

See CUSTOMS LAWS.

COMMISSIONER OF GENERAL LAND OFFICE.

See LANDS, PUBLIC, 3; TIMBER TRESPASSES, 5.

COMMISSIONER OF PENSIONS.

Duty of the Commissioner of Pensions considered in connection with a statement of facts submitted by him, relating to the recovery of money paid on a pension certificate alleged to have been fraudulently obtained. 210.

See ACCOUNTS AND ACCOUNTING OFFICERS, 3, 4; PENSION, 4.

COMMISSIONERS OF EMIGRATION.

See IMMIGRANT.

COMPENSATION.

1. The Commissioners appointed under the act of February 4, 1887, chap. 104, creating the Interstate Commerce Commission, are entitled to draw pay only from the time they entered upon the discharge of their duties respectively. 47.
2. District attorneys are entitled to special compensation for their services in examining titles to lands purchased by the United States. 63.
3. The Attorney-General is invested with sole authority to employ and fix their compensation where the performance of such services by them is called for. *Ibid.*
4. Expenses thus arising, including office fees for searches, copies of record, etc., being incidental to the purchase of the land, are ordinarily to be paid out of the appropriation made for the purchase. *Ibid.*
5. The elements necessary to justify the payment of compensation to an officer for additional services are: that they shall be performed by virtue of a separate and distinct appointment authorized by law; that such services shall not be services added to or connected with the regular duties of the place he holds; and that a compensation whose amount is fixed by law or regulation shall be provided for their payment. 121.
6. A United States marshal, appointed an agent in pursuance of section 5276, Revised Statutes, to bring back a fugitive criminal from a foreign country, is entitled to receive compensation for this service out of the fund appropriated "for bringing home fugitive criminals," where the amount of the compensation is fixed by regulation before his appointment; otherwise he is entitled to be paid his expenses only. *Ibid.*
7. Where a district attorney instituted proceedings for the forfeiture under section 5239, Revised Statutes, of "all the rights, privileges, and franchises" of a national banking association, by direction of the Solicitor of the Treasury, agreeably to section 380, Revised Statutes: Advised that the account of the district attorney for his services, upon approval thereof by the Attorney-

COMPENSATION—Continued.

- General, may properly be paid out of the appropriation for the payment of miscellaneous expenses authorized by the Attorney-General. 152.
8. By act of July 11, 1888, chapter 614, the office of chargé d'affaires to Paraguay and Uruguay, the salary of which was \$5,000 per annum, was abolished, and provision made for representing the United States there by a minister at \$7,500 a year. B., who at that time held the former office, was on the 11th of August, 1888, appointed minister. He received his commission at his place of duty on the 3d of October, 1888, and on the latter date took the official oath and entered upon the duties of his office as minister: *Advised* that B. is entitled to draw his salary as minister from the 3d of October, 1888, the date on which he qualified for the office and entered upon its duties, and not from the date of his appointment (Aug. 11, 1888). 219.
9. When the United States attorney at New York appears in the cases mentioned in section 827, Revised Statutes, by direction of the Secretary or Solicitor of the Treasury, a proper and reasonable allowance for his services in such cases may be made to him by the Secretary of the Treasury under that section. 354.
10. The allowance so made under section 827 is in addition to the annual salary provided by section 770, Revised Statutes, for the ordinary official services of the district attorney. *Ibid.*
11. Inspectors of customs are not entitled to receive a per diem compensation under section 2733, Revised Statutes, for periods during which they are absent from duty on account of sickness or from any other cause. 420.
12. The fourth section of the act of March 3, 1883, chapter 128, does not affect the provisions of said section 2733 regulating the compensation of such inspectors. *Ibid.*
13. B., while a private soldier, received a certificate of merit from the President for distinguished services, which entitled him, under section 1285, Revised Statutes, to "additional pay at the rate of \$2 per month." He was discharged as such private soldier, and thereupon enlisted as a "general service messenger," agreeably to the provisions of the act of July 29, 1886, chapter 810: *Held*, that he is not entitled, as such general service messenger, in addition to the compensation provided for in that act, to the \$2 per month provided for in said section 1285. 471.

COMPROMISE.

Where a judgment was recovered by the United States against a corporation in a suit for a penalty for violation of the provisions of the act of February 26, 1845, chapter 164, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," etc.: *Advised*, that it is extremely doubtful whether the power given to the Secretary of the Treasury by section 3469,

COMPROMISE—Continued.

Revised Statutes, to compromise "any claim," extends to a judgment such as the above—*i. e.*, for a fine, penalty, or forfeiture. 344.

CONSTITUTIONAL LAW.

See **POSTAL SERVICE**, 4, 5.

CONSTRUCTION OF STATUTES.

See **STATUTES, INTERPRETATION OF**.

CONSUL.

1. A foreign consul, resident in the United States, must look for protection in his person and property to the laws of the State in which he resides. 16.
2. Under the laws and usages governing the American consular service, the authentication, noting, etc., of marine protests are to be regarded as official consular services. 196.
3. The new edition of the Consular Regulations of 1888 contains provisions making the fee for a consular certificate to an invoice of merchandise not subject to duty official and returnable to the Treasury. 225.
4. The fee for such certificate may be rendered official by Executive order, and specially included in the tariff of official fees under the Revised Statutes. *Ibid.*

CONSULAR CERTIFICATES.

See **CONSUL**, 3, 4; **CUSTOMS LAWS**, 8.

CONSULAR COURT.

See **CONVICT**.

CONTRACT.

1. The instrument signed by Ambrose W. Thompson, for himself and the Chiriqui Improvement Company, and Isaac Toucey, Secretary of the Navy, dated May 21, 1859, is in no sense a contract obligatory upon the United States. 50.
2. The appropriation of \$200,000, made by the act of March 3, 1881, chapter 133, "To enable the Secretary of the Navy to establish at the Isthmus of Panama naval stations and depots of coal for the supply of steamships of war," has no application thereto. *Ibid.*
3. The third section of the act of March 2, 1887, chapter 320, permits purchases not exceeding \$3,000 in amount to be made in open market without advertisement, in the discretion of the Secretary of the Interior, as often as a "case of exigency" exists, so that the gross purchases keep within the sum appropriated. 95.
4. The Commission created by the act of April 15, 1886, chapter 50, may, in the construction of the Congressional Library Building, contract for personal services without previous advertisement; and within that description of services come those rendered by

CONTRACT—Continued.

- mechanics and laborers who may be employed to place the stone properly in the wall directly under the control and supervision of the Commission, its architect, or superintendent of construction. 96.
5. Under the act of April 4, 1888, chapter 59, the Secretary of the Interior is authorized to find that certain services rendered the Pottawatomie Indians were contracted for in good faith by persons empowered to represent said Indians. 134.
 6. The Postmaster-General may discontinue a contract for carrying the mail before expiration of the term thereof, allowing the contractor one month's extra pay, when in his judgment the public interests require such discontinuance, for the purpose of re-advertising and reletting the service on an increased schedule, in preference to permitting the contractor to perform the increased service at the pro rata to which he would be entitled under his contract. 146.
 7. Under the act of August 3, 1882, chapter 376, and the contract made by the Secretary of the Treasury agreeably thereto with the commissioners of emigration of the State of New York, the latter are not bound to account for and pay over to the Treasury Department moneys received by them for privileges granted to individuals to transact in Castle Garden certain business with the immigrants there. 155.
 8. A manufacturing company, after having entered into a contract with the Navy Department to deliver a large quantity of steel castings to be used in the construction of an armored cruiser, proposed to transfer the contract to another manufacturing company, which contemplated fulfilling the covenants of the former company with the Government, and asked the approval of such transfer by the Secretary of the Navy: *Advised* that, in view of the prohibition in section 3737, Revised Statutes, the proposed transfer can not lawfully be approved and recognized by the Navy Department. 186.
 9. Upon the facts stated: *Advised* that a contract entered into on the 15th of December, 1887, between Charles Rohr and the Bureau of Animal Industry of the Department of Agriculture, may be considered rescinded and no longer binding upon said Bureau after June 30, 1888. 224.
 10. The Secretary of the Interior may approve a certain contract of E. John Ellis with the Pottawatomie Indians, as recommended by the Commissioner of Indian Affairs. 242.
 11. Upon the facts submitted: *Advised* that the proposal made by Messrs. Mooney & Ferguson, dated February 17, 1889, to sell to the United States a site for a public building at Buffalo, N. Y., and the response of the Secretary of the Treasury thereto, dated March 1, 1889, do not constitute a contract obligatory upon the United States. 269.
 12. The Secretary can not by contract bind the Government to exercise

CONTRACT—Continued.

its power of eminent domain to enable persons to sell to the Government land which they do not own. *Ibid.*

13. The Post-Office Department has no power, under existing laws, to make contracts for the transmission of intelligence by telegraph, for the general public, as a part or branch of the postal service. 650.

CONTRACT SURGEON.

See CIVIL SERVICE, 4.

CONVICT.

1. There is no statute which authorizes a convict, sentenced to prison by a consular court of the United States, to be brought to the United States for imprisonment and there held to serve out his sentence; and in the absence of such a statute the removal of the convict to this country for that purpose would be unlawful. Opinion of Attorney-General Williams, of February 4, 1875 (14 Opin., 522), cited with approval. 377.
2. The President, by virtue of his office and without authority given by some statute, has no power to remove a convict from one prison to another. *Ibid.*

COUNSEL.

See EMPLOYMENT OF COUNSEL.

COURT-MARTIAL.

1. An officer who is authorized to order a general court-martial has no power under the 112th article of war to pardon or mitigate the punishment adjudged by it after confirmation by him of the sentence. 106.
2. Upon consideration of articles 24, 43, and 44, for the government of the Navy (sec. 1624, Rev. Stat.): *Held*, that there may be two arrests, namely, (1) an arrest in an emergency, or upon discovery of the alleged wrongdoing, with a view to a preliminary examination, and, if necessary, the formulation and specification of charges; (2) an arrest for trial: *held*, further, that article 43 in the provision declaring that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest," has reference to the arrest for trial, and not to the arrest in the first instance. 472.
3. A naval court-martial, or judge advocate thereof, has no power to compel a civilian who is not subject to the articles for the government of the Navy to appear and testify before such court. 501.
4. Neither article 42 nor article 57 in section 1624, Revised Statutes, gives the power to compel the attendance of civilian witnesses. *Ibid.*
5. The provisions of section 1202, Revised Statutes, apply only to military (i. e. army) courts. *Ibid.*

COVERINGS OF IMPORTED MERCHANDISE.

See CUSTOMS LAWS, 1, 18.

CUSTOMS LAWS.

1. The proviso in section 7 of the act of March 3, 1883, chapter 121, subjecting to a duty of "100 per centum ad valorem upon the actual value of the same," coverings of imported merchandise designed for use otherwise than in the bona fide transportation of such merchandise to the United States, etc., applies to free as well as to dutiable importations. 18.
- . *Advised* that the classification of roll paper heretofore adopted under paragraph 392, Tariff Index, new, should be adhered to. 59.
3. Coriander seed should be classified under paragraph No. 636, Tariff Index, as "seeds, aromatic, which are not edible," etc. 75.
4. Imported merchandise, while in the custody of the customs officers, is not subject to attachment at the suit of private parties; and those officers should pay no attention to processes of that kind against such merchandise, when served on them. 101.
5. *Advised* that iron-bar ends, consisting of the crop-ends, from 1 to 4 inches long, cut off from the Swedish bar-iron in the process of manufacturing the bars, have not been "in actual use" so as to justify their classification as scrap-iron under Schedule "C" of the act of March 3, 1883, chapter 121. 103.
6. *Advised* that if certain lap-robés or carriage-robés, sometimes called railway or traveling rugs, were commercially known at the time of the passage of the act of March 3, 1883, chapter 121, as mats or rüge, they should be classified under a certain clause of Schedule K of that act, providing for "carpets and carpetings of wool, etc., and mats, rugs," etc.; but that if not so known, nor by any other designation provided for, they should be classified according to the component material. 104.
7. The phrase "forgings of iron and steel," as used in clauses Nos. 163 and 167 (T. I., new), of the act of March 3, 1883, chapter 121, includes forgings made of iron and forgings made of steel, and is not limited to articles composed of both iron and steel combined in the same forging. 157.
8. A certified consular invoice is required by law for the admission to entry of imported merchandise not subject to duty, excepting where Congress has expressly dispensed with that requirement. 225.
9. When a person at different times between April, 1882, and October, 1887, paid to customs officers, by deductions from drawbacks allowed him, alleged illegal fees, but gave no notice of dissatisfaction and took no appeal from the decisions of such officers to the Treasury Department: *Advised* that he can not recover back such fees by suit. 238.
10. In February and March, 1886, certain liquors (which had been manufactured in the United States, in a bonded manufacturing warehouse established under the provisions of section 3433, Re-

CUSTOMS LAWS—Continued.

- vised Statutes, out of both domestic and imported spirits that were removed to such warehouse without payment of either the internal-revenue or customs duties, and which liquors had been exported therefrom) were imported into New York and assessed with the duty prescribed by the statute (Schedule H) as foreign liquors: *Advised* that—the liquors being of the manufacture of the United States and once exported—section 2500, Revised Statutes, affords the rule under which to levy duties thereon. 243.
11. That section does not contemplate the levying of different rates of duty on the several different ingredients of which an article may be composed; it is the product that is to be taxed, not its constituent ingredients. *Ibid.*
 12. Classification, under the act of March 3, 1883, chap. 121, of Chinese shoes composed of felt, leather, and cotton, and also Chinese shoes in which silk is the component material of chief value, considered. 272.
 13. Opinion of April 3, 1889 (*ante*, p. 272), respecting the classification for duty of certain descriptions of Chinese shoes, explained; and *advised* that the opinion referred to does not justify any change in the administration of the customs laws, except as to importations like those concerning which it was written. 301.
 14. *Advised* that the decision of the Treasury Department of April, 1871, holding that the article known as New Zealand flax is dutiable as flax not hackled or dressed, should be modified so as to classify the article for duty under the provision for sunn, sisal-grass, and other vegetable substances not specially enumerated or provided for. 334.
 15. Sawed mahogany boards are not dutiable under Schedule D (act of March 3, 1883, chapter 121) as "manufactures of mahogany," but are dutiable under the provision of that schedule "for all other articles of sawed lumber," etc. Opinion of Attorney-General Garland of January 21, 1887 (18 Opin., 535), concurred in. 366.
 16. Shellfish, such as oysters, Chinese abelones, etc., when prepared by drying or pickling, are entitled to free entry. 401.
 17. Steel chains used for bicycle gearing should be classified for duty under paragraph 171 (not under paragraph 216) of the act of March 3, 1883, chapter 121. 527.
 18. Where philosophical instruments were imported in boxes about 8 inches square, made of hard wood, stained and finely finished, each box having a sliding lid and a metal handle, and being of dimensions sufficient to hold one instrument: *Advised* that these boxes were intended to follow their contents into consumption, and to be used therewith both as a protection to them and as furnishing a convenient means of carrying them about, and therefore that they were "designed for use otherwise than in the bona fide transportation" of their contents to the United States, and consequently are dutiable at 100 per cent. ad valorem under

CUSTOMS LAWS—Continued.

- the proviso of the seventh section of the act of March 3, 1883, chapter 121. 543.
19. Merchandise which is in bond, or on shipboard within the limits of a port of entry, on August 1, 1890, is not subject to duty upon a valuation that includes the costs and charges mentioned in section 19 of the act of June 10, 1890, chapter 407, entitled "An act to simplify the laws in relation to the collection of the revenues." As to such merchandise the act of March 3, 1883, chapter 121, by which the costs and charges referred to are excluded as an element of dutiable value, remains in force and determines the duty thereon. 602.
20. Commissions on imported merchandise which do not grow out of the costs, charges, and expenses mentioned in said section 19 of the act of June 10, 1890, form no part of the dutiable value of merchandise under that act. *Ibid.*
21. The Secretary of the Treasury is not authorized to employ any part of the appropriation for collecting the revenue from customs in the erection of a temporary structure at a collection port for the purposes of the customs service. 607.
22. No building, even of a temporary character, to be used for storage purposes, can be erected at the public expense without special authority from Congress. *Ibid.*
23. Upon consideration of the provisions of section 3019, Revised Statutes, allowing a drawback on all articles wholly manufactured of imported materials on which duties have been paid: *Advised* that the person entitled to the drawback under that section is the exporter of the goods—*i. e.*, the owner and shipper or consignor thereof to the foreign port—and he may collect it by his duly authorized agent. 638.
24. Where the shipper acts only as the agent of the owner, the drawback belongs to the latter; and if the shipper is without authority from the owner to receive the drawback, it should be paid to the owner. *Ibid.*
25. The power to make regulations for the ascertainment of the person to whom the drawback is payable, conferred upon the Secretary of the Treasury by said section, is a power to declare the rules of evidence upon which the Government officers will act in determining who that person is; and the only limitation upon it is that its exercise shall be reasonable. *Ibid.*
26. It would be a reasonable regulation to declare that the shipper (the consignor in the bill of lading), in the absence of any evidence to the contrary, will be regarded as the owner or exporter of the goods and as entitled to the drawback. *Ibid.*
27. The statement of the manufacturer of merchandise consigned by him or on his account for sale in the United States, declaring the cost of the production of such merchandise, which is required by section 8 of the act of June 10, 1890, chapter 407, entitled "An act to simplify the laws in relation to the collection

CUSTOMS LAWS—Continued.

- of the revenue," to be presented to the collector at the time of the entry of the merchandise, should be signed by the manufacturer himself. The signing of such statement by an agent is insufficient. 655.
28. It is not necessary for the manufacturer to appear in person before the proper consular officer and sign the statement in his presence, in order that it may receive the attestation of such officer, as required by the same section. Should the consular officer certify that it has been satisfactorily shown to him that the statement is, as it purports to be, the act of the manufacturer, this would be an attestation of the statement, and meet the requirement of the statute. 656.
29. Where, at the instance of the importer, a reappraisal of certain items of the invoice by the general appraiser was ordered under the provisions of section 13 of the act of June 10, 1890, chapter 407, entitled "An act to simplify the laws in relation to the collection of the revenue," and the importer being dissatisfied with the reappraisal of such items thereupon made, the matter was referred to a board of three general appraisers, under the provisions of the same section, who not only reappraised the items on which the appeal to them was taken, but reappraised and advanced in value other items of the invoice as to which there was no appeal: *Held* that, under said section, it was not within the competency of the board of general appraisers to pass upon any items which were not embraced in the case submitted for their examination and decision, and that the board should have confined itself to those items only which were covered by the importer's appeal. 655.
30. Where the date of original importation of merchandise in bond was more than one year prior to August 1, 1890 (when the act of June 10, 1890, chapter 407, entitled "An act to symplify the laws in relation to the collection of the revenue," went into effect): *Advised*, that such merchandise is subject to the "additional duty of 10 per centum" imposed by section 2970, Revised Statutes, by virtue of the saving clause in section 29 of said act of June 10, 1890, which saves to the Government all rights that existed in its behalf when that act took effect. 668.
31. The provision in the act of March 3, 1883, chapter 121, allowing a drawback on bituminous coal imported into the United States, which is afterwards used for fuel on steam vessels of the United States engaged in the coasting or foreign trade, is repealed by the act of October 1, 1890, chapter 1244. 687.
32. *Sembler* that the term "supplies," as employed in section 16 of the act of June 26, 1884, chapter 121, includes coal. *Ibid.*
33. Under paragraph 199 of the act of October 1, 1890, chapter 1244, imported lead ore is dutiable at the rate of 1½ cents a pound, irrespective of the quantity of lead which the ore may contain. 690.

CUSTOMS LAWS—Continued.

34. The words "all other ores," as used in the proviso of that paragraph, mean all ores other than those known commercially as lead ores. *Ibid.*
35. Imported molasses can not, under paragraph 241 of the act of October 1, 1890, chapter 1244, be refined in bond without payment of duty between March 1 and April 1, 1891. The provisions of that paragraph are applicable only to sugars in solid form. 697.

DAKOTA LAND GRANT.

1. Under the provisions of section 14 of the act of February 22, 1889, chapter 180, the States of North Dakota and South Dakota take each seventy-two sections of land for university purposes. 635.
2. Lands which were selected for the Territory of Dakota under the act of February 18, 1881, chapter 61, and which lie within the State of South Dakota, should be certified to that State. *Ibid.*

DEED.

See **FORT BROWN RESERVATION.**

DEPENDENT PARENT.

See **PENSION**, 8.

DEPOSIT OF SAVINGS.

See **MARINE CORPS**, 3.

DEPUTY SURVEYOR OF CUSTOMS.

There is no statutory provision authorizing the appointment of more than one deputy surveyor of customs, at the same time, at each of the ports named in section 2722, Revised Statutes. 629.

DESIGNS FOR COINS.

See **COINS OF THE UNITED STATES.**

DEVICE FOR MARKING GOVERNMENT FIREARMS.

Sensible that the United States, having first appropriated the device of an eagle, with the letters U. S. under it, for the purpose of marking firearms manufactured by the Government, may prevent any private manufacturer using the same device on firearms manufactured by him, and thus falsely representing to the world that his firearms were made by the United States. 361.

DIPLOMATIC AND CONSULAR OFFICERS.

See **COMPENSATION**, 8.

DISBURSEMENT OF PUBLIC MONEY.

See **CLAIMS**, 7.

DISBURSING AGENT.

Upon consideration of the various statutory provisions in force relating to disbursing agents for the payment of moneys for the construction of public buildings (secs. 3657, 3658, and 255, Rev. Stat.): *Advised* (1) that in the absence of any special designa-

DISBURSING AGENT—Continued.

tion by the Secretary of the Treasury, the collector of customs of the district in which the building is being erected should act as such disbursing agent; (2) that it is competent to the Secretary, in any case, to designate the collector or any other bonded officer to act; (3) that when such building is at a place in which there is no collector, the Secretary may, in his discretion, designate a private citizen to act. 393.

DISTRIBUTION OF ARMS TO THE MILITIA.

See **MILITIA**.

DISTRIBUTION OF UNITED STATES REPORTS.

See **SUPREME COURT REPORTS**.

DISTRICT ATTORNEY.

See **COMPENSATION**, 2, 3, 7, 9, 10; **NATIONAL BANKING ASSOCIATIONS**, 1, 2.

DISTRICT OF COLUMBIA.

A notary public appointed for the District of Columbia has no power to take acknowledgments of deeds in foreign countries (where he may at the time be) for property situated in said District. 81.

DOUBLE PENSIONS.

See **PENSION**, 4, 5.

DRAWBACK.

See **CUSTOMS LAWS**, 23, 24, 25, 26, 31.

EIGHT-HOUR LAW.

Power of the President considered with reference to the administration of the eight-hour law. 685.

EMINENT DOMAIN.

See **CONTRACT**, 12.

EMPLOYMENT OF COUNSEL.

The provision in the act of July 18, 1888, chapter 677, making an appropriation "for carrying out the provisions of the act of May 29, 1884, establishing the Bureau of Animal Industry," does not authorize the Commissioner of Agriculture to employ counsel for the defense of employés of the Bureau for acts done by them in carrying out such provisions under its direction. Employment of counsel in such cases is governed by sections 189, 362, and 383, Revised Statutes. 328.

EMPLOYMENT OF TROOPS.

See **MILITARY FORCES, EMPLOYMENT OF**.

EPIDEMIC DISEASES.

See **QUARANTINE**.

ESCHEAT.

See JURISDICTION.

ESTATE OF THOMAS CONNER.

See JURISDICTION.

EXAMINATION, APPLICATION FOR.

See CIVIL SERVICE, 6, 7, 8, 9.

EXCHANGE OF GOLD BARS FOR GOLD COIN.

1. The words "are hereby authorized," in the act of May 26, 1832, chapter 190, providing for the exchange of gold bars for gold coin by the superintendents of the coinage mints and of the assay office at New York, are to be construed as mandatory upon those officers. 575.
2. It is not discretionary with the Secretary of the Treasury to refuse such exchange, nor can he lawfully direct those officers so to do. *Ibid.*
3. A charge for the preparation of the bars can not be exacted on an exchange thereof for coin under said act. *Ibid.*
4. Opinion of July 1, 1890 (*ante*, p. 576), construing the act of May 26, 1832, chapter 190, with respect to the exchange of gold bars for coin, reaffirmed. 594.

EXCLUSION FROM THE MAIL.

See POSTAL SERVICE, 10, 11.

EXTRA COMPENSATION.

See COMPENSATION, 5.

FEES OF CONSULS.

See CONSUL, 3, 4.

FINES, PENALTIES, AND FORFEITURES.

Opinion of March 19, 1887, (18 Opin., 584), namely, that the Secretary of the Treasury has no power to remit the forfeiture of a vessel condemned for being engaged in unlawfully killing fur seals (the case not arising in either of the islands St. Paul and St. George), reaffirmed. 5.

FOREIGN MAIL SERVICE.

See POSTAL SERVICE.

FORFEITURE.

See FINES, PENALTIES, AND FORFEITURES.

FORT BRADY.

Upon the facts submitted: *Advised* that, under the deed of Thomas Ryan and wife, dated December 18, 1886, granting to the United States certain land at Sault Ste. Marie, Mich., selected for a new site for Fort Brady, the title to the premises has become vested in the United States. 137.

FORT BROWN RESERVATION.

The deed of conveyance to the United States from James Stillman and Thomas Carson, administrator, etc., dated October 14, 1887, which is offered for the acceptance of the Government (together with the quitclaim deed of S. Josephine Allen, dated October 24, 1887, the quitclaim deed of Francis J. Hale *et al.*, dated November 15, 1887, the quitclaim deed of William H. Hale, dated December 3, 1887, and the quitclaim deed of Thomas Carson, dated December 12, 1887, are sufficient to pass a valid title to the tract of land known as the Fort Brown military reservation in Texas, and to extinguish all claims for the use and occupancy of said reservation by the United States. 82.

FORT MISSOULA MILITARY RESERVATION.

See **LANDS, PUBLIC, 7.**

FRANKING PRIVILEGE.

Where the seat of a member of the House, as Representative from a certain Congressional district, was contested, and the contestant, not the then sitting member, was adjudged by the House to have been elected a Representative from that district, and therefore entitled to the seat, whereupon he qualified and took his seat as such Representative: *Held* that the unseated member had no right thereafter to send public documents through the mail free of postage, under the proviso in the first section of the act of March 3, 1879, chapter 180. 592.

FUR SEALS.

The Secretary of the Treasury derives no authority, under section 1963, Revised Statutes, to make a new lease of the right to take fur seals on the islands of St. Paul and St. George, in Alaska, until the expiration of the existing lease. 432.

GOLD BARS.

See **EXCHANGE OF GOLD BARS FOR GOLD COIN.**

GRANT TO THE UNITED STATES.

The grant to the Government of the site of the Hospital Point Light Station in Massachusetts, which is bounded by a line running to the shore and thence *by the shore*, etc., does not include the shore. 20.

HEAD MONEY.

See **SHIPPING, 3.**

HOSPITAL POINT LIGHT STATION.

See **GRANT TO THE UNITED STATES.**

HUDSON RIVER, DUMPING MATERIAL IN.

1. The authority conferred upon the Secretary of War by the act of June 29, 1888, chapter 496, does not extend to the waters of the Hudson River as far distant from New York Harbor as Troy, Albany, and New Baltimore. 317.

HUDSON RIVER, DUMPING MATERIAL IN—Continued.

2. The term "tributary waters," as used in that act, covers only such parts of the river as, in a broad sense, can be regarded as connected with that harbor. *Ibid.*

IMMIGRANT.

1. Under the act of August 3, 1882, chapter 376, and the contract made by the Secretary of the Treasury agreeably thereto with the commissioners of emigration of the State of New York, the latter are not bound to account for and pay over to the Treasury Department moneys received by them for privileges granted to individuals to transact in Castle Garden certain business with the immigrants there. 155.
2. In carrying out the provisions of the act of August 3, 1882, chapter 376, the Secretary of the Treasury is not restricted to the employment of the means and agencies mentioned in the second and fourth sections of that act, but may, in his discretion, have recourse to other appropriate means and agencies. 486.

INDIAN CONTRACT.

See CONTRACT, 5, 10.

INDIANS AND INDIAN LANDS.

1. The allotments of land to Indians provided for by the act of February 8, 1887, chapter 119, should, under the requirements of the third section of that act, be made jointly by an agent specially appointed for that purpose and the agent in charge of the reservation. 14.
2. The Klamath River, where it flows through the Klamath Indian Reservation, is a navigable stream, in which the Indians occupying that reservation do not have an exclusive right to fish, but only a right in common with the public at large. 35.
3. Under the act of June 1, 1886, chapter 395, authorizing the Kansas and Arkansas Valley Railway Company to construct a railroad through the Indian Territory, that company has no right to go beyond the limits of the right of way therein prescribed for the purpose of taking timber or other materials for the construction of such railroad. 42.
4. The courts named in the eighth section of that act have jurisdiction over controversies between said company and the Cherokee Nation growing out of the taking of timber and other materials by the former beyond said limits. But the right of the Cherokees to go into court does not diminish in any degree the duty of the Executive Department of the Government to use its power for their protection. *Ibid.*
5. The Attorney-General deems it inexpedient to express an opinion upon certain questions proposed, relating to a right of fishery in the Klamath River, California, claimed in behalf of the Klamath Indians; such questions being justiciable in the appropriate courts at the suit of the Indians themselves who are interested in them. 56

INDIANS AND INDIAN LANDS—Continued.

6. Case of two brothers, W. C. Lykins and E. W. W. Lykins, claiming to be members of the confederated tribes of the Kaskaskias, Peorias, Weas, and Piankeshaws, considered. 115.
7. Under the act of April 4, 1888, chapter 59, the Secretary of the Interior is authorized to find that certain services rendered the Pottawatomie Indians were contracted for in good faith by persons empowered to represent said Indians. 134.
8. Lands entered and patented to Indians under the provisions of the act of March 3, 1875, chapter 131, before the act of July 4, 1884, chapter 180, became a law, are exempt from taxation for a period of five years from the date of the patent issued therefor. 161.
9. The said act of July 4, 1884, is supplementary to the said act of March 3, 1875, and its provisions apply to all entries under the latter act for which patents had not issued when the former act took effect. Under the act of 1884 the lands entered are exempt from taxation for a period of twenty-five years from the date of the patent. *Ibid.*
10. Under the act of January 18, 1881, chapter 23, for the benefit of the Winnebago Indians, the land entered is expressly exempt from taxation for twenty years. *Ibid.*
11. Lands allotted to Indians under the provisions of the act of February 8, 1887, chapter 119, are exempt from taxation for twenty-five years. *Ibid.*
12. Indians occupying reservations, the title to which is in the United States subject to their occupancy, have no right to cut and remove the dead and fallen timber thereon for the purpose of sale alone; such timber, where not used by the Indians for fuel or for agricultural or other purposes connected with the occupation of the land, being the property of the United States. 194.
13. An Indian allottee of land under the act of February 8, 1887, chapter 119, does not possess the right to cut and sell merchantable timber standing upon the land, excepting such as it may be necessary to cut in clearing the premises for agricultural or grazing purposes, or to erect suitable buildings thereon. 232.
14. Until the second patent provided for by the fifth section of said act is granted, it is the duty of the Interior Department, by virtue of the legal title remaining in the Government and the trust relation assumed by it, to prevent the cutting of timber except for the above-mentioned purposes, whether the land is or is not within an Indian reservation. *Ibid.*
15. The Indian allottees of the Kickapoo tribe, under the treaty of June 28, 1862, take their rights to the tracts allotted to them, which have not yet been patented, under and by virtue of the said treaty as extended by the act of August 4, 1866, chapter 897, and not under act of February 8, 1887, chapter 119. 255.
16. Patents to those allottees to whom certificates were given under said treaty, but who had not received patents, should be issued

INDIANS AND INDIAN LANDS—Continued.

- under and in accordance with the terms of the treaty as extended by the said act of 1866. *Ibid.*
17. The sixth section of said act of 1887, with respect to citizenship, applies to the Kickapoos who took allotments under the said treaty before the passage of that act as well as to those who have taken allotments since its passage and in pursuance of its provisions. But as the right of citizenship is only to be accorded after the patent is granted, the oath and proof required by the treaty, being prerequisites thereunder, must be taken and furnished. *Ibid.*
 18. The appropriation made by section 25 of the act of March 2, 1889, chapter 405, to be applied and used towards surveying the lands therein described as being opened for settlement, does not become available until acceptance by the different bands of Sioux Indians of the terms of that act as provided in the twenty-eighth section thereof. 467.
 19. That act takes effect when, as matter of fact, the consent of the Indians thereto has been obtained. The proclamation issued under the provisions of section 28 of the act is only designed to be a public evidence of such consent. *Ibid.*
 20. The Cherokee Nation of Indians can not make a valid lease of their lands without the consent of the Government. Opinion of Attorney-General Garland of July 21, 1885 (18 Opin., 235), reaffirmed. 499.
 21. It is the duty of the Government to protect the Indian allottees under the act of March 2, 1889, chapter 412 in the enjoyment of their allotments, and in the discharge of that duty the military forces of the United States may, if necessary, be employed by the President for their protection. 511.
 22. An Indian allottee under the act of February 8, 1887, chapter 119, may remove and sell *dead* timber, standing or fallen, from his allotment. 559.
 23. Such allottee can not lawfully lease or rent the whole or any part of his allotment, either with or without the approval of the Secretary of the Interior. *Ibid.*
 24. Nor can he lawfully impart to a third person, by contract, the right to erect upon his allotment mills for the manufacture of lumber or other products. *Ibid.*

See **CHOCTAW NATION, LAWS OF ; CITIZENSHIP IN THE CHEROKEE NATION : OKLAHOMA.**

INDIAN SCHOOLS.

The 8th section of the act of June 29, 1888, chapter 503, making appropriations for the current and contingent expenses of the Indian Department, etc., had no effect on the then existing appointments of superintendents, teachers, etc., connected with Indian schools wholly supported by the Government. The incumbents of the various positions referred to were lawfully in

INDIAN SCHOOLS—Continued.

the public service after that act went into operation, and are legally entitled to be paid for their services during such period. 252.

INDIAN SUPPLIES, PURCHASE OF.

See **CONTRACT**, 3.

INDIAN TERRITORY.

1. The marshal appointed under the act of March 1, 1889, chapter 233, providing for the organization of a court in the Indian Territory, has the same powers in that Territory which a sheriff in Arkansas has in his own county; and his power to appoint deputies is limited only by the necessity of the case. 293.
2. He may call to his assistance, in the execution of the law, civilians, but not the military forces of the United States, the use of the latter as *posse comitatus* being forbidden by the act of June 18, 1878, chapter 263. *Ibid.*
3. It is competent to the President, under section 5298, Revised Statutes, to direct the military forces to render the marshal such aid as may be necessary to enable him to maintain the peace and enforce the laws of the United States in that Territory. *Ibid.*
4. Upon consideration of the effect of certain provisions in treaties with the Creek Nation of Indians of August 28, 1856, and August 11, 1866, which render inoperative in the Creek territory the various national banking laws: *Advised* that a national bank can not lawfully be established at Muscogee, a town in the territory of that nation. 342.
5. The United States court for the Indian Territory is not invested with authority to appoint commissioners; and hence the accounts of commissioners thereby appointed, for issuing writs for the arrest of persons charged with offenses, are inadmissible. 443.
6. Such writs are no protection to the marshal for anything he may do under them, nor is he entitled to compensation for serving them. *Ibid.*

INFORMER.

See **TIMBER TRESPASSES**, 3.

INSPECTORS OF CUSTOMS.

1. Inspectors of customs are not entitled to receive a per diem compensation under section 2733, Revised Statutes, for periods during which they are absent from duty on account of sickness or for any other cause. 420.
2. The fourth section of the act of March 3, 1883, chapter 128, does not affect the provisions of said section 2733 regulating the compensation of such inspectors. *Ibid.*

INSPECTORS OF STEAM VESSELS.

1. The notice for convening the "board of designators," provided for in section 4415, Revised Statutes, should be such as to give each member a reasonable time to be present at the meeting and a knowledge of its object; and though such notice is not required by the statute to be in writing, it would be advisable to require written notice by regulation. 648.
2. The members should meet together as a board, organize as a board, and act as a board, in making the designation to fill the vacant or new inspectorship. *Ibid.*
See **APPOINTMENT**, 11.

INTERNAL REVENUE.

See **OKLAHOMA**, 2, 4.

INTERSTATE COMMERCE COMMISSION.

1. By the provisions of the act of February 4, 1887, chapter 104, creating the Interstate Commerce Commission, the terms of the five Commissioners first appointed thereunder must be computed from January 1, 1887, although their appointments were made March 22, 1887. 47.
2. But they are entitled to draw pay only from the time they entered upon the discharge of their duties respectively. *Ibid.*

IRRIGATING DITCH THROUGH MILITARY RESERVATION.

See **LICENSE**.

IRRIGATION.

See **LANDS, PUBLIC**, 10.

JUDGES, ASSIGNMENT OF IN ARIZONA TERRITORY.

See **TERRITORIES**, 6, 7.

JUDGMENT.

See **COMPROMISE**.

JUDGMENT OF COURT OF CLAIMS.

See **PAYMENT**, 3.

JURISDICTION.

1. C., having for several years been a beneficiary and resident in the United States Naval Asylum at Philadelphia, died in the asylum in August, 1888, intestate, leaving personal effects of the value of about \$12,000, which were turned over to the proper officer at the asylum agreeably to regulations prescribed by the Secretary of the Navy under section 4811, Revised Statutes, for the disposition of the property of decedents in such cases. In November, 1888, letters of administration were granted on C.'s estate under the law of Pennsylvania by the State court; and in December, 1888, an inquisition in proceedings in escheat was had in the State court, whereby his estate purported to be escheated

JURISDICTION—Continued.

- to the Commonwealth of Pennsylvania. The escheator and the administrator apply to the Secretary of the Navy for delivery of the personal effects of the decedent now in possession of the officer of the asylum. It appearing that in April, 1834, the State ceded to the United States jurisdiction over the land occupied by the asylum: *Advised* that the proceedings of the State court granting administration of the estate of C., and escheating the same, were void for want of jurisdiction, and that neither the administrator nor the escheator has any right to the possession of such estate. 247.
2. Upon the facts submitted in relation to the alleged abandonment upon the island of Arenas Key, Mexico, by the master of an American schooner, of three men, one of whom was killed by another of the three: *Advised* that if a crime was committed by one of the men on the island, it was committed within the jurisdiction of Mexico, and the courts of the United States have no jurisdiction over the same; furthermore, that the master and owners of the vessel do not appear to have committed any offense cognizable under the statutes of the United States. 391.
3. No constitutional objection is perceived to a provision in the proposed consular convention between the United States and Great Britain, conferring upon the courts of each country jurisdiction of offenses committed on vessels of the other on the high seas. 644.

See **NO MAN'S LAND.**

KANSAS.

See **CLAIMS**, 3, 4.

KANSAS AND ARKANSAS VALLEY RAILROAD COMPANY.

See **INDIANS AND INDIAN LANDS**, 3, 4.

KANSAS FIVE PER CENT. FUND.

See **CLAIMS**, 4.

KICKAPOO INDIANS.

See **INDIAN AND INDIAN LANDS**, 15, 16, 17.

KLAMATH INDIANS.

See **INDIANS AND INDIAN LANDS**, 2, 5.

LAND-GRANT RAILROADS.

1. The joint resolution of May 31, 1870 (16 Stat., 378), added a second indemnity belt to the land grant made to the Northern Pacific Railroad Company by the act of July 2, 1864, chapter 217, such grant thus having two indemnity belts. 88.
2. Indemnity selections within the *first* belt (i. e., that originally created by the act of 1864) are not restricted to the limits of the particular State or Territory in which the granted lands were lost, but may be made outside of those limits. *Ibid.*

LAND-GRANT RAILROADS—Continued.

3. The *proviso* in section 23 of the act of March 3, 1871, chapter 22, excepts from the operation of the grant made by that section to the Southern Pacific Railroad Company of California all lands within the primary limits of the road of said company which also fall within the primary or indemnity limits of the grant to the Atlantic and Pacific Railroad Company now forfeited, and such lands can be restored to settlement and entry under the general land laws. 134.
4. The claim of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company (successor of the Chicago and Northwestern Railroad Company) to certain lands under the land grants made to the State of Wisconsin by the acts of June 3, 1856, chapter 43, and May 5, 1864, chapter 80, considered. 522.
5. The transportation of an officer in the Corps of Engineers of the Army, while traveling in the discharge of duties connected with river and harbor improvements to which he has been assigned, comes within the provisions of the Michigan land-grant act of June 3, 1856, chapter 44, and of the act of July 3, 1866, chapter 158, supplementary thereto, requiring the transportation of troops of the United States free from toll or other charge. 572.
See PAYMENT, 2.

LANDS, PUBLIC.

1. *Sembler* that as to the Nolan claim to certain land in New Mexico, known as claim No. 39, there has not as yet been any "final action by Congress," as contemplated in the eighth section of the act of July 22, 1854, chapter 103. 8.
2. The proviso in the fourth section of the act of July 1, 1870, chapter 202, confirming the Nolan grant, No. 48, does not include the above-mentioned claim, No. 39. *Ibid.*
3. Where a substantial allegation of fraud or mistake is made, the sustaining of which will restore to the public domain land wrongfully patented, or subserve the public interest or protect the public right, the Commissioner of the General Land Office may, in his discretion, direct a resurvey of patented land. 126.
4. Such survey would not be conclusive, but, in connection with other testimony, might be admissible as evidence to maintain the allegation. *Ibid.*
5. In the case of a voidable entry of public land upon which a patent has already issued, where the action of the board of equitable adjudication is applied for with a view to obtaining the issue of a new patent by the Commissioner of the General Land Office under section 2456, Revised Statutes, a surrender of the outstanding patent should accompany the application or be made before the entry is acted upon by the board. 188.
6. The outstanding patent, when surrendered, need not be canceled until after confirmation of the entry; it is sufficient if the cancellation take place previously to the issue of a new patent. *Ibid.*

LANDS, PUBLIC—Continued.

7. By Executive order of August 5, 1878, 50 acres of land were added to the Fort Missoula military reservation, which was originally established with an area of 640 acres by Executive order of February 19, 1877. The land covered by these orders was formerly within the Territory of Oregon; but under the act of March 2, 1853, chapter 90, establishing the Territory of Washington, it fell within the latter Territory; and when the Territory of Montana was created, by the act of May 26, 1864, chapter 95, it became a part of that Territory, and so remained at the time said orders were issued. By the act of February 14, 1853, chapter 69, it was provided that all reservations theretofore as was as thereafter made under the act of September 27, 1850, chapter 76 (which applied to Oregon only), should as to forts be limited to not exceeding 640 acres at any one place; and the aforesaid act of May 26, 1864, declared that all laws of the United States not locally inapplicable shall have the same force and effect within the Territory of Montana as elsewhere within the United States: *Held* that the act of 1864 was intended to give effect in Montana only to such general laws of the United States as were not inapplicable to that Territory, and not to legislation of a special or local character; that the limitation of 640 acres was not made operative thereby in Montana; that the President was fully empowered to make the order of August 5, 1888; and that while such order remains unrevoked the land covered thereby is not open to entry or settlement. 370.
8. The grant made by the act of March 3, 1875, chapter 152, of a right of way through the public lands, with the necessary land for stations, etc., was meant for railroad companies intending to operate roads as common carriers for the benefit and convenience of the public, and not for the benefit of the companies solely. 546.
9. Where a railroad made application to the Secretary of the Interior with a view to securing the benefit of the said act of 1875, and its articles of incorporation and map of definite location were approved by the Secretary, but it afterwards appeared that the action of the Secretary was based upon a mistake of fact caused by the representation of the railroad company itself, and that the application was for a purpose not within the statute: *Held* that it is competent to the Secretary to recall and annul his action approving the line of definite location of the road and entering the same on the public plats. 547.
10. The provision in the act of October 2, 1888, chapter 1069, reserving from sale or entry lands designated or selected for reservoirs, ditches, or canals for irrigation purposes, and also lands made susceptible of irrigation by such reservoirs, ditches, or canals, operates as an immediate withdrawal of the lands thus described from entry and settlement. 564.
11. The provision in the act of August 30, 1890, chapter 837, declaring

LANDS, PUBLIC—Continued.

- that "no person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate under all of said laws," does not operate upon entries made prior to the date of the act. 704.
12. An applicant who, by such prior entries, has already acquired title to 320 acres is not thereby precluded from acquiring title to an additional quantity, not exceeding 320 acres, by home-stead entry, timber-land, or other claim under the land laws, filed subsequent to the date of the act. *Ibid.*

LEASE.

See **FUR SEALS; INDIANS AND INDIAN LANDS**, 20, 23.

LICENSE.

Where application was made to the Secretary of War for license to construct and maintain an irrigating ditch through the military reservation at Fort Selden, N. Mex., the licensee to furnish free to the United States all water required for military purposes: *Advised* that, in view of the benefits to be derived by the fort from the use of the water and other considerations, such license may properly be granted under well-considered restrictions and revocable at the will and pleasure of the Secretary. 628.

See **STEAM ENGINEERS**.

MAIL CONTRACT.

See **CONTRACT**, 5.

MAIL MATTER, DIRECTIONS ON.

See **POSTAL SERVICE**, 7.

MANUFACTURER'S STATEMENT.

See **CUSTOMS LAWS**, 27, 28.

MARINE CORPS.

1. The phrase, "by reason of absence from his command at the time he became entitled to his discharge," as used in the first section of the act of August 14, 1888, chapter 890, is to be regarded as equally applicable to the date when the term of enlistment of the applicant expired, and to the date when he would have received his discharge along with other enlisted men with whom he served, had he been present. 221.
2. The *proviso* in the third section of that act is applicable to the latter section alone. *Ibid.*
3. The act of February 9, 1889, chapter 119, "to provide for the deposit of the savings of seamen of the United States Navy," does not extend to enlisted men of the Marine Corps. 616.

MARINE CORPS—Continued.

4. The provisions of section 1 of the act of June 16, 1890, entitled "An act to prevent desertions from the Army, and for other purposes," are applicable to enlisted men of the Marine Corps by force and effect of section 1612, Revised Statutes; but those of sections 2, 3, and 4 of that act are inapplicable thereto. *Ibid.*

MARSHAL.

See **COMPENSATION**, 6.

MARSHAL OF INDIAN TERRITORY.

See **INDIAN TERRITORY**, 1, 2, 3.

MASSACHUSETTS, CLAIM OF.

See **CLAIMS**, 9, 10.

MEDICAL CORPS OF THE NAVY.

See **NAVY**, 1, 2.

MEMBER OF CONGRESS.

See **FRANKING PRIVILEGE**.

MILITARY FORCES, EMPLOYMENT OF.

1. Question as to what extent and under what circumstances the military forces of the United States may be used for the protection of life and property in Alaska, considered; and the views expressed in a former opinion, dated April 18, 1889 (*ante*, p. 293), submitted as covering the question. 368.
2. The provision in section 15 of the act of June 18, 1878, chapter 263, forbidding the employment of the Army as a *posse comitatus* for the purpose of executing the laws, does not abridge the power to use any part of the land or naval forces, or militia, for the purposes set forth in section 1989, Revised Statutes. 570.

MILITIA.

1. Provisions of section 1661, Revised Statutes, and of the act of February 12, 1887, chapter 129, touching the distribution of arms to the militia of the several States and Territories, considered. 61.
2. Where a State or Territory had an unexpended balance to its credit, under the old law, on June 30, 1887, which still remains available, such balance can be drawn upon to supply ordnance stores to it. *Ibid.*
3. But where the quota belonging to any State or Territory, under the old law, has been overdrawn, the amount overdrawn is not to be charged to such State or Territory under the new law. *Ibid.*

MOLASSES.

See **CUSTOMS LAWS**, 35.

NATIONAL BANKING ASSOCIATIONS.

1. The expenses of proceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking

NATIONAL BANKING ASSOCIATIONS—Continued.

association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association. 633.

2. What would be a reasonable fee for the services of the district attorney depends upon the circumstances of the particular case.
Ibid.

See ALASKA, 1; INDIAN TERRITORY, 4; OKLAHOMA, 3, 5.

NAVAL ACADEMY.

1. Where certain naval cadets were found deficient at the semi-annual examination held at the Naval Academy in January, 1889, and, without the recommendation of the Academic Board, were granted leaves of absence by the Secretary of the Navy with permission to report to the Superintendent of the Academy to join the next fourth class: *Held* that the Secretary had no power to continue these cadets in the Academy without the recommendation of the Academic Board. 302.
2. Where a naval cadet tendered his resignation, and it was accepted by the Secretary of the Navy and the cadet duly notified thereof, but in a short time (about two weeks) afterwards the cadet made application to withdraw his resignation, which was granted by the Secretary, who at the same time instructed him to report to the Superintendent of the Academy: *Held* that by the resignation and its acceptance the relations of the cadet with the Naval Academy were completely severed and his position there became vacant; that he could not be reinstated otherwise than by an appointment in conformity to sections 1514 and 1515, Revised Statutes; and that the action of the Secretary in permitting the withdrawal of the resignation after its acceptance had no legal effect whatever. 350.
3. Where certain members of the graduating class at the Naval Academy were reported as physically disqualified for the naval service, but as mentally and professionally qualified, and were placed among the "surplus graduates:" *Advised* that under the acts of August 5, 1882, chapter 391, and March 2, 1889, chapter 396, they were each entitled as such surplus graduates to a certificate of graduation, an honorable discharge, and one year's pay, and that there is no authority in the law for stating in such certificate the physical disqualification of the graduate. 358.

NAVAL CADET.

See NAVAL ACADEMY.

NAVAL COURT-MARTIAL.

See COURT-MARTIAL.

NAVY.

1. In the organization of the Medical Corps of the Navy a passed assistant surgeon and an assistant surgeon are officers of one and the same grade, but belong to different classes in such grade. 169

NAVY—Continued.

2. A passed assistant surgeon is simply an assistant surgeon who has been officially notified that he has passed successfully the examination necessary to be undergone before he can be appointed a full surgeon when a vacancy occurs. *Ibid.*
3. The phrase, "by reason of absence from his command at the time he became entitled to his discharge," as used in the first section of the act of August 14, 1888, chapter 830, is to be regarded as equally applicable to the date when the term of enlistment of the applicant expired and to the date when he would have received his discharge along with other enlisted men with whom he served had he been present. 221.
4. The *proviso* in the third section of that act is applicable to the latter section alone. *Ibid.*
5. The words "exclusive of armament," as used in the first section of the act of August 3, 1886, chapter 849, are not to be understood as excluding the offensive armament, such as guns, torpedoes, etc., *only*; the term "armament" comprehending, besides those articles, such shields and protections as are directly and necessarily connected with the efficient and safe working thereof. 235.

NAVY DEPARTMENT, BUREAU OFFICERS IN.

1. A naval officer assigned to duty as an assistant to the chief of a bureau in the Navy Department is not authorized by section 178, Revised Statutes, in case of the death, resignation, absence, or sickness of the latter (where the President has not otherwise directed, as provided by Sec. 179, Rev. Stat.), to perform the duties of such chief until his successor is appointed or until his sickness or absence shall cease. 503.
2. The phrase "assistant or deputy of such chief," etc., in said section 178, is to be construed as including an assistant or deputy only whose appointment is specifically provided for by statute. *Ibid.*

NAVY PENSION LIST.

The revenue cutters employed in carrying out the order issued by President Lincoln to the Secretary of the Treasury, dated June 14, 1863, were, while so employed, coöperating with the Navy by order of the President; and if any of the officers or seamen thereof, during such employment, were wounded or disabled in the discharge of their duty, they became entitled to be placed on the Navy pension list at the same rate of pension and under the same regulations and restrictions as are provided by law for the officers and seamen of the Navy. 503.

NOLAN LAND CLAIM.

See LANDS, PUBLIC, 1, 2.

NO MAN'S LAND.

1. The strip of territory known as "No Man's Land" not being within any existing judicial district, punishment of crime com-

NO MAN'S LAND—Continued.

mitted therein will not be within reach of the criminal law of the United States (see sixth article of amendments to the Constitution) until legislative action is had ascertaining the district which shall embrace such strip. 66.

2. Upon reëxamination of the question whether the territory called "No Man's Land" lies within the boundaries of any judicial district of the United States: *Advised* (1) that from January 6, 1883, to March 1, 1889, said territory was included within the boundaries of the judicial district for the northern district of Texas; (2) that since March 1, 1889, it has been and is included in the judicial district for the eastern district of Texas; thus dissenting from the opinion of Attorney-General Garland of November 15, 1887, (*ante*, p. 66). 477.
3. Violations of laws of the United States committed within that territory are properly cognizable in the circuit and district courts of the United States for the eastern district of Texas. *Ibid.*

NORTH DAKOTA.

See **DAKOTA LAND GRANT**.

NORTHERN PACIFIC RAILROAD COMPANY.

See **LAND-GRANT RAILROADS**, 1, 2.

NOTARY PUBLIC.

See **DISTRICT OF COLUMBIA**, 1.

OBSTRUCTION TO NAVIGATION.

1. The obstructions to navigation contemplated by sections 9 and 10 of the act of August 11, 1888, chapter 860, are such as pertain to the structure and plan of the bridge, in view of its location. Obstructions caused by failure to promptly open the draw of the bridge for passing vessels are not within those sections. 395.
2. The bridge over the Muskingum River at Taylorsville, Ohio, is a nuisance to navigation which ought to be abated. 599.
3. The case of the county bridge over the Muskingum River at Taylorsville, Ohio, on which an opinion of the Attorney-General was given July 19, 1890 (*ante*, p. 599), distinguished from the case of the bridge of the Baltimore and Ohio Southwestern Railway Company across the same river at Marietta, Ohio, subsequently presented, and that opinion shown to be inapplicable to the latter case by reason of recent statutory amendments affecting it. 676.

OFFENSES ON THE HIGH SEAS.

See **JURISDICTION**, 3.

OFFICE.

See **APPOINTMENT**.

OKLAHOMA.

1. The Indian title to the lands within the Territory known as Oklahoma having become extinguished, and the lands thrown open to settlement, that Territory has ceased to be "Indian country," and sections 2139 and 2140, Revised Statutes, are accordingly no longer applicable thereto; nor is the sale of spirituous liquors and beer in such Territory forbidden thereby. 306.
2. Yet, for reasons stated, the Internal Revenue Department may decline to furnish special revenue stamps for the sale of intoxicating liquors within that Territory until Congress shall have time to consider the subject. *Ibid.*
3. Under existing legislation relating to the establishment of national banking associations, and in the present condition of Oklahoma (being without a government and system of laws), such banking associations can not lawfully be authorized and established in the Territory known by that name. 315.
4. The act of May 2, 1890, chapter 182, entitled "An act to provide a temporary government for the Territory of Oklahoma," etc., having an established organized government in that Territory no reason now exists for making any distinction between it and any other organized Territory with reference to the enforcement of the internal revenue laws. 569.
5. In view of the provisions of the act of May 2, 1890, chapter 182, entitled "An act to provide a temporary government for the Territory of Oklahoma," etc.: *Advised* that there no longer exists any obstacle to the establishment of national banking associations in the Indian Territory. 585.
6. Where the legislature of Oklahoma Territory, at its first session, took a recess for one or more days on account of an approaching election: *Advised*, that the period covered by the recess should be counted as part of the one hundred and twenty days limited for such session by section 4 of the (organic) act of May 2, 1890, chapter 182. 682.

OWNERSHIP OF REAL ESTATE BY ALIENS.

See ALIENS. *

PARDON.

1. An officer who is authorized to order a general court-martial has no power under the 112th article of war to pardon or mitigate the punishment adjudged by it after confirmation by him of the sentence. 106.
2. The President has power to grant a pardon to a prisoner undergoing punishment for a contempt of court. 476.

PATENT, LAND.

See LANDS, PUBLIC, 5, 6; SWAMP-LAND GRANT.

PATENTS FOR INVENTIONS.

1. By section 4902, Revised Statutes, the privilege of filing caveats in the Patent Office preliminary to applications for patents is

PATENTS FOR INVENTIONS—Continued.

limited to citizens of the United States, and aliens who have resided therein one year and declared their intention to become citizens. 273.

2. The second article of the convention entered into between the United States and certain other nations, proclaimed by the President on June 7, 1887, is not self-executing; and Congress having passed no law for its execution, it can not be deemed to extend the privilege granted by said section 4902 to all subjects and citizens of the nations parties to said convention. 274.
3. A naval officer or employé of the Government at a navy-yard who has invented an article for use in the naval service and patented it, if the invention does not relate to a matter as to which he was specially directed to experiment with a view to suggest improvements, is entitled to compensation from the Government for the use of such a title, in addition to his salary or pay as such officer or employé. 407.
4. It makes no difference that the invention consists of an improvement upon an article already patented, and that when the improvement was patented the officer or employé was assigned to the duty of superintending for the Government the manufacture of the article improved upon. *Ibid.*
5. The Secretary of the Navy can not legally contract with the patentee for the purchase of his patent, or for a license to use it, under an appropriation limited to the purchase of material and the employment of labor in the manufacture of such article out of it. *Ibid.*
6. Where letters patent were allowed on the original application, December 9, 1887, but the final fee was not paid as required by statute; and the same were again allowed on a renewed application, under section 4897, Revised Statutes, December 4, 1889; and (payment of final fee as required not having been made on the last allowance) a second application for renewal, under said section, was filed June 7, 1890: *Advised* that the applicant is not entitled to an allowance of letters patent on such second application, the statutory limitation (two years) imposed by said section having attached before the filing thereof. 693.

PAYMENT.

1. In September, 1887, H. entered into a contract with the Quartermaster's Department to perform certain work, but afterwards, being in default, it was arranged that his bondsmen, C. and R., should take charge of and complete the work; and in pursuance of this arrangement H. executed and delivered a power of attorney to them, by which they were authorized to receive and receipt for the money due on the contract. C. and R. signed received vouchers for the balance due: *Advised* that the Department may recognize the power of attorney of H., and that payment to C. and R. upon the received vouchers thereunder will discharge the Government. 239.

PAYMENT—Continued.

2. The payment of accounts of land-grant railroads (*i.e.*, such as have not received aid in Government bonds) for army transportation, under the appropriation act of September 22, 1888, chapter 1027, is not controlled by the *proviso* in the acts of June 30, 1882, chapter 250, and August 5, 1882, chapter 390, but is governed by the provisions of the act of 1888 alone; and under these provisions such accounts can be lawfully paid by a quartermaster without previous action thereon by the accounting officers of the Treasury. 264.
3. Where a judgment against the United States was recovered in the Court of Claims, and a stipulation was made, which is of record in the case, to the effect that neither the plaintiff nor the defendant would take an appeal from such judgment: *Advised* that there is no legal objection to payment of the judgment before the expiration of the ninety days allowed by statute for taking an appeal. 281.
4. By a joint resolution passed July 10, 1888, Congress provided that the matters in controversy between S. and the District of Columbia should be submitted to the arbitration of three persons to be appointed by the President, whose award should be final and conclusive as to such matters, and directed the Secretary of the Treasury, in case the award should be in favor of S., "to pay said award," in the same manner that judgments against the District of Columbia are paid when rendered by the Court of Claims. Arbitrators were duly appointed, who awarded S. the sum of \$28,257.38 with interest from November 10, 1874, and the costs of certain suits then pending. Since the award was made suits in equity have been brought against S. in the supreme court of the District of Columbia by parties claiming as assignees of his claim against the District, and injunctions have been issued in these suits enjoining him from receiving payment of the award. These suits being consolidated, and the court having appointed receivers with power to receive payment of the award, the latter now formally demand of the Secretary of the Treasury payment of the award to them; S. also demands payment thereof to him; and his assignees demand that their rights as such shall be respected by the Secretary in paying the award: *Advised* that the Secretary can not properly pay the award to the receivers (inasmuch as he is not subject to the jurisdiction of the said court with regard to the fund in question, and it is only when payment is made under the compulsion of an order of a court of competent jurisdiction that the party paying is relieved of liability as to the money paid); *advised* further that it would be improper, under the circumstances of the cases, for the Secretary to pay it to S., but that he should hold on to the fund until the controversy over it between S. and his assignees, pending in said court, shall have been closed by a decree. 450.

PAYMENT—Continued.

5. The case of George H. Giddings (16 Opin., 367) distinguished from the present case. *Ibid.*

See DRAWBACK

PENALTY.

See FINES, PENALTIES, AND FORFEITURES.

PENNSYLVANIA, CLAIM OF.

See CLAIMS, 5.

PENSION.

1. The terms "accrued pensions," as used in section 4718, Revised Statutes, mean the amount of money *unpaid* by the Government to which a pensioner, or a person who had a valid claim for pension pending, was entitled at the time of his death. 1.
2. The receipt by a pensioner of a check for the amount due him on his pension, which was indorsed but not transferred by him in his lifetime, is not *payment*. The amount so due is accordingly "accrued pension," and is payable to those only who are entitled thereto under such section. *Ibid.*
3. Where an application for a pension was made by letter, sufficient to identify the claimant and the claim, and was placed on file as a part of the record of the case before July 1, 1880, and the claim was not abandoned, but delay in its prosecution satisfactorily accounted for by sickness: *Advised* that (the claim being subsequently established and allowed) such application by letter is sufficient to warrant the granting of arrears of pension provided for by section 2 of the act of March 3, 1879, chapter 187. 190.
4. A person to whom a pension certificate was granted as the widow of a soldier in the war of the rebellion was also granted a pension certificate as the widow of a soldier in the war of 1812, and drew pensions upon both certificates from March 9, 1878, to December 3, 1883. The Commissioner of Pensions, on discovering this, required her to make an election, and she having elected to hold the first-mentioned certificate, he ordered the amount which had been paid to her upon the other certificate to be withheld in installments of \$6 per month from payments thereafter, and issued an order to the pension agent accordingly: *Advised* that the order made in this case, being within the general jurisdiction of the Commissioner, is obligatory on the pension agent, and that the accounting officers of the Treasury have no power to disallow payments made by the agent pursuant thereto. 214.
5. In the case above stated, the whole of the monthly pension under the certificate which the pensioner elected to hold should be withheld until the amounts so withheld shall equal the sum paid the pensioner under the other certificate. 215.
6. The *proviso* in the act of March 1, 1889, chapter 332, authorizing payment to a deceased pensioner's legal representatives, in cer-

PENSION—Continued.

- tain contingencies, of the accrued pension due on his pension certificate at the time of his death, is to be construed as applicable to all outstanding pension certificates, whether issued before or since the passage of the act. 359.
7. But the pensioner must have died since the passage of that act to entitle his legal representatives to claim such accrued pension.
Ibid.
8. The first section of the act of June 27, 1890, chap. 634, entitled "An act granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor," etc., is to be regarded as an amendment of section 4707, Revised Statutes; and so regarded, the word "soldier" employed therein should be construed to comprehend also sailor and marine—the term being used as a short expression to embrace all the persons under section 4707 whose death entitled their parents to a pension. 586.

See **NAVY PENSION LIST.**

PENSION AGENT.

See **BOND**, 4.

PENSION OFFICE.

The special authority given by the act of July 11, 1888, chapter 615, to appoint or detail five supervising examiners in the Bureau of Pensions, with headquarters in the District of Columbia, is prohibitory of the appointment or detail of a greater number for the District or for places other than the District. 327.

POSSE COMITATUS.

See **INDIAN TERRITORY**, 2; **MILITARY FORCES, EMPLOYMENT OF**, 2.

POSTAL CONVENTIONS WITH FOREIGN COUNTRIES.

See **POSTAL SERVICE**, 1, 4, 5, 6.

POSTAL GUIDE.

The determination of what shall be the contents of the Postal Guide rests entirely with the Postmaster-General. 521.

POSTAL SERVICE.

1. Under section 398, Revised Statutes, the Postmaster-General has power, with the approbation of the President, to conclude a postal convention with a foreign country for admission to and transmission through the mails exchanged with such foreign country of parcels of mail matter of either class exceeding 4 pounds in weight. The limitation as to weight of mail packages in section 3879, Revised Statutes, applies only to domestic mail service. 39.
2. The Postmaster-General may discontinue a contract for carrying the mail before expiration of the term thereof, allowing the contractor one month's extra pay, when in his judgment the public interests require such discontinuance, for the purpose of read-

POSTAL SERVICE—Continued.

- vertising and reletting the service on an increased schedule, in preference to permitting the contractor to perform the increased service at the pro rata to which he would be entitled under his contract. 146.
3. The authority conferred upon the Postmaster-General by the act of March 2, 1889, chapter 374, to classify and fix the salaries of the clerks and employés in first and second class post-offices is not merely discretionary with him. It imports a duty to make the classification of such salaries which is provided for in the act. 324.
4. Upon a review of the legislation passed by Congress, from the beginning of the Government down to the present time, conferring upon the Postmaster-General power to make postal arrangements and conventions with foreign countries, and the practice of the Government thereunder: Advised that such legislation and practice sanction an interpretation of the Constitution different from that which might be reached by the ordinary rules of construction were the question a new one, and that the provisions of section 398, Revised Statutes, authorizing the Postmaster-General, with the advice and consent of the President, to negotiate and conclude postal treaties and conventions between the United States and foreign countries, are not in conflict with that part of section 2, Article II, of the Constitution, giving the President "power by and with the advice and consent of the Senate to make treaties," etc. 513
5. *Sembler* that the right of Congress to vest in the Postmaster-General power to conclude conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails may be derived from the authority given that body in the seventh clause of section 8, Article I, of the Constitution, to establish post-offices and post-roads. *Ibid.*
6. As to the power of the Postmaster General to enter into conventions with foreign governments touching the regulation of foreign parcels post, opinion of Attorney-General Garland of June 30, 1887 (*ante*, p. 39), cited with approval. *Ibid.*
7. The following words printed upon the wrapper of a newspaper sent by mail, namely, "Sample copy; if not called for by party to whom addressed postmaster please deliver to some local teacher," held to be a direction for delivery within the meaning of section 1 of the act of January 20, 1888, chapter 2, and therefore permissible. 596.
8. The Post-Office Department has no power, under existing laws, to make contracts for the transmission of intelligence by telegraph for the general public, as a part or branch of the postal service. 650.
9. Mail matter, as defined by statute, does not include telegraphic correspondence, as such; nor does the power given the Postmaster-General to contract for carrying the mail include authority

POSTAL SERVICE—Continued.

to contract for sending messages by telegraph for the benefit of the people at large. *Ibid.*

10. Where a certain book was excluded from the mails on the ground of indecency, by an order of the Postmaster-General issued under the act of September 26, 1888, chapter 1039, and it appeared that certain newspapers were republishing the same book in installments or parts: *Advised* that the said order would not justify the exclusion from the mails of every copy of such newspapers, as some of the parts or installments of the book appearing therein may be unobjectionable. 667.
11. Where a newspaper contained an advertisement offering in good faith a certain sum of money to the sender of the first "guess" giving the correct or nearest number of votes which each of two opposing candidates, of different political parties, for a designated State office, shall receive at the next ensuing election, the guessing period to end with the day on which the election takes place: *Held* that the scheme thus advertised is not one offering a prize "dependent upon lot or chance," within the meaning of section 3894, Revised Statutes, as amended by the act of September 19, 1890, chapter 908, and that the newspaper containing the advertisement is not, by the provisions of said section, excluded from the mail. 679.

POSTMASTER-GENERAL.

The authority conferred upon the Postmaster-General by the act of March 2, 1889, chapter 374, to classify and fix the salaries of the clerks and employés in first and second class post-offices is not merely discretionary with him. It imports a duty to make the classification of such salaries which is provided for in the act. 324.

See **CONTRACT**, 6, 13; **POSTAL SERVICE**, 1, 2, 3, 4, 5, 6, 8, 9.

POTTAWATOMIE INDIANS.

See **CONTRACT**, 5, 10; **INDIANS AND INDIAN LANDS**, 7.

POWER OF ATTORNEY.

1. In September, 1887, H. entered into a contract with the Quartermaster's Department to perform certain work, but afterwards, being in default, it was arranged that his bondsmen, C. and R., should take charge of and complete the work; and in pursuance of this arrangement H. executed and delivered a power of attorney to them, by which they were authorized to receive and receipt for the money due on the contract. C. and R. signed receipted vouchers for the balance due: *Advised* that the Department may recognize the power of attorney of H., and that payment to C. and R. upon the receipted vouchers thereunder will discharge the Government. 239.
2. A power of attorney given to collect a claim against the Government with an agreement that the donee of the power shall receive "a

POWER OF ATTORNEY—Continued.

- sum equal to 50 per cent. of the amount allowed" on the claim, is not a power coupled with an interest, and is revocable. 483.
3. The power having been given to a firm, one of the members of which has since died, whereby the firm became dissolved, such power can not be executed by the surviving members. *Ibid.*
 4. Under the circumstances stated, the power should not be recognized. *Ibid.*

PRESIDENT.

The President, by virtue of his office and without authority given by some statute, has no power to remove a convict from one prison to another. 377.

See **APPOINTMENT**, 1, 2; **INDIANS AND INDIAN LANDS**, 21; **INDIAN TERRITORY**, 3; **LANDS, PUBLIC**, 7; **QUARANTINE**; **WORLD'S COLUMBIAN EXPOSITION**.

PRIVATE LAND CLAIMS IN NEW MEXICO.

See **LANDS, PUBLIC**, 1, 2.

PROCESS.

See **INDIAN TERRITORY**, 5, 6.

PROPERTY LOST IN THE MILITARY SERVICE.

See **CLAIMS**, 11, 12.

PUBLIC BUILDING.

See **CUSTOMS LAWS**, 22; **DISBURSING AGENT**.

PUBLIC LANDS.

See **LANDS, PUBLIC**.

PURCHASE OF LAND.

1. *Advised* that the provision in the act of August 5, 1886, chapter 929, namely : "Improving Great Kanawha River, West Virginia. Continuing improvement, one hundred and eighty-seven thousand five hundred dollars," does not, by implication, authorize the purchase of land for said improvement. 34.
2. The appropriation made by the act of March 3, 1887, chapter 362, "for the erection of monuments or memorial tablets for the purpose of marking the position of each of the commands of the regular army engaged at Gettysburg," is not applicable to the purchase of land for the sites of such monuments or tablets. 79.
3. The act of March 5, 1888, chap. 23, entitled "An act for the purchase of a site, including the building thereon, etc., for the use of the office of the Chief Signal Officer of the Army," etc., does not carry with it an appropriation of money for the objects designated therein. 131.
4. Upon the facts submitted: *Advised* that, under the deed of Thomas Ryan and wife, dated December 18, 1886, granting to the United

PURCHASE OF LAND—Continued.

- States certain land at Sault Ste. Marie, Mich., selected for a new site for Fort Brady, the title to the premises has become vested in the United States. 137.
5. Upon the facts submitted: *Advised* that the proposal made by Messrs. Mooney & Ferguson, dated February 17, 1889, to sell to the United States a site for a public building, at Buffalo, N. Y., and the response of the Secretary of the Treasury thereto, dated March 1, 1889, do not constitute a contract obligatory upon the United States. 269.
 6. The Secretary can not by contract bind the Government to exercise its power of eminent domain, to enable persons to sell to the Government land which they do not own. *Ibid.*
 7. The act of March 29, 1888, chap. 45, entitled "An act for the erection of a public building at Springfield, Mo.," authorizes the Secretary of the Treasury to purchase "a site," and when this is done his authority in that regard is exhausted; he is not at liberty to buy another site in addition to the first. 297.
 8. As such authority is limited to a single site, so the authority derived thereunder to select and contract for the purchase of a site is likewise restricted. *Ibid.*
 9. Assuming that the contract to purchase a particular site, made with Messrs. Wooley, Porter & Hubbell, still exists, the Secretary is without authority to select a second site and contract for its purchase. *Ibid.*
 10. Should that contract become rescinded, or otherwise determined, without any actual sale taking place, the authority to select and contract for the purchase of another site would revive. *Ibid.*
 11. The obligation to pay for the property arises when a valid title thereto is conveyed and becomes vested in the United States; hence not until acceptance of the deeds tendered by the vendors. *Ibid.*

PURCHASE OF UNITED STATES BONDS.

See **BONDS OF THE UNITED STATES.**

QUARANTINE.

Upon the facts submitted: *Advised* that the President has authority to use so much of the unexpended balance of the sum appropriated by the joint resolutions approved September 26 and October 12, 1888, as may be necessary in his judgment for the purpose of keeping the various quarantine stations open throughout the fiscal year 1889–90. 399.

QUARTERMASTER'S VOLUNTEERS.

See **CIVIL SERVICE, 2.**

RAILROAD LAND-GRANTS, ADJUSTMENT OF.

1. The terms "bona fide purchasers of said unclaimed land," as used in the third proviso of section 3 of the act of March 3, 1887, chap-

RAILROAD LAND-GRANTS, ADJUSTMENT OF—Continued.

- ter 376, mean those persons who, without knowledge of wrong or error, have purchased from the railroad company lands which had been previously entered by a preëmption or homestead settler, where entry had been erroneously canceled as described in the first clause of that section, and which land the preëmption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the second section of the act. 68.
2. Patents, the issue whereof is provided for in the fourth section of the same act, are only intended to be issued after it shall have been legally determined, in the mode prescribed in the second section, that the certification or patent to the railroad company had been erroneously issued. *Ibid.*
3. The word "grant," in the fifth section, should be construed to include (as it does in the preceding sections of the act) both the primary and the indemnity limits. *Ibid.*

RAILWAY MAIL SERVICE.

See APPOINTMENT, 5, 7, 8.

REAPPOINTMENT.

See CIVIL SERVICE, 1.

REEXAMINATION OF CLAIMS.

See CLAIMS, 5, 6.

REFUND OF HEAD TAX.

See SECRETARY OF THE TREASURY, 5.

REFUND OF MONEYS IMPROPERLY EXACTED.

See SECRETARY OF THE TREASURY, 4.

REFUND OF TONNAGE TAX.

See SECRETARY OF THE TREASURY, 6.

REMISSION OF FORFEITURE.

See FINES, PENALTIES, AND FORFEITURES, 1.

RENDITION OF ACCOUNTS.

See ACCOUNTS AND ACCOUNTING OFFICERS, 9, 10.

REOPENING OF ACCOUNTS.

See ACCOUNTS AND ACCOUNTING OFFICERS, 8.

REPRESENTATIVE IN CONGRESS.

See FRANKING PRIVILEGE.

RESERVATION.

See FORT BROWN RESERVATION; LANDS, PUBLIC, 10.

RESIGNATION.

See NAVAL ACADEMY, 2.

RESURVEY OF PATENTED LAND.

1. Where a substantial allegation of fraud or mistake is made, the sustaining of which will restore to the public domain land wrongfully patented, or subserve the public interest or protect the public right, the Commissioner of the General Land Office may, in his discretion, direct a resurvey of patented land. 126.
2. Such survey would not be conclusive, but, in connection with other testimony, might be admissible as evidence to maintain the allegation, *Ibid.*

RETAINED PAY OF SOLDIERS.

See ACCOUNTS AND ACCOUNTING OFFICERS, 11.

RETIRED LIST.

See ARMY, 1, 2, 3, 4, 9, 10, 11.

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SECRETARY OF THE INTERIOR.

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SECRETARY OF THE NAVY.

See BOND; NAVAL ACADEMY, 1; PATENTS FOR INVENTIONS, 5; SURETY, 1, 3.

SECRETARY OF THE TREASURY.

1. The Secretary of the Treasury can not legally, by departmental order, change a practice or course of office prescribed by statute for the settlement of accounts. 177.
2. The Secretary of the Treasury has power, under sections 161, Revised Statutes, to make a regulation which prescribes that the oaths to be taken by an officer of the Revenue Marine Service, or an officer or employé in any branch of the customs service, to the correctness of his account for pay or salary, as required by sections 1790 and 2693, Revised Statutes, shall be taken before some person authorized to administer oaths generally. 401.
3. The Secretary of the Treasury is not authorized to employ any part of the appropriation for collecting the revenue from customs in the erection of a temporary structure at a collection port for the purposes of the customs service. 607.
4. Moneys improperly exacted from and paid by vessels proceeding under section 29 of the act of June 26, 1884, chapter 121, to unlade at places other than a port of entry, may be refunded by the Secretary of the Treasury, without formal protest by the applicant, in cases where application has been made within one year of such payment. 646.
5. Where a claim was made for a refund of "head tax" alleged to have been illegally exacted in August, 1890, by the collector at Baltimore in the case of the steamship *Russia*, under the provisions of the act of August 3, 1882, chapter 376: *Advised* that the Secretary of the Treasury is authorized by section 26 of the act of June 26, 1884, chapter 121, to refund the head tax thus exacted, or so much thereof as he may think proper, if, on investigation, he finds that the same was illegally, improperly, or excessively imposed. 660.
6. And where a claim was made for a refund of "tonnage tax" alleged to have been illegally exacted from the steamer *Cuba* in August, 1890, by the collector at Philadelphia: *Advised, also*, that the Secretary of the Treasury may, under said section 26, refund such tonnage tax if he finds that it was illegally, improperly, or excessively imposed, and in case the Commissioner of Navigation shall have first decided, under section 3 of the act of July 5, 1884, chapter 221, that such tax was erroneously or illegally exacted. *Ibid.*
7. Section 3 of the act of August 3, 1882, chapter 376, known as the immigration act, invests the Secretary of the Treasury with power to make all necessary regulations for carrying out its provisions; and under this power he may, by regulation, forbid the landing by the master of any passenger from his vessel until an examination of all the passengers thereon is had, whether cabin or steerage. 706.

See ACCOUNTS AND ACCOUNTING OFFICERS, 10; BONDS OF THE UNITED STATES; COMPENSATION, 9; COMPROMISE; DISBURSING AGENT; EXCHANGE OF GOLD BARS FOR GOLD COIN, 2; FINES,

SECRETARY OF THE TREASURY—Continued.

PENALTIES, AND FORFEITURES; FUR SEALS; IMMIGRANT, 2;
PAYMENT, 4; PURCHASE OF LAND, 6, 7; SINKING FUND.

SECRETARY OF WAR.

See CLAIMS, 11; HUDSON RIVER, DUMPING MATERIAL IN; LICENSE; WASHINGTON AQUEDUCT TUNNEL, 1.

SEIZURES IN INDIAN TERRITORY.

In the case of a seizure of cattle in Indian Territory, alleged to be in violation of the treaties between the Cherokee Nation and the United States: *Advised* that the complainant should seek redress not by application to the executive, but to the judicial department of the Government, the courts of the United States for the western district of Arkansas having full jurisdiction of the subject-matter. 173.

SETTLEMENTS, REOPENING OF.

See ACCOUNTS AND ACCOUNTING OFFICERS, 8.

SHIPPING.

1. The shipping commissioners act of June 7, 1872, chapter 322 (Title 53, Merchant Seamen, Revised Statutes), has no application to seamen employed on vessels engaged in the service of the Coast and Geodetic Survey. 182.
2. Moneys improperly exacted from and paid by vessels proceeding under section 29 of the act of June 26, 1834, chapter 121, to unlade at places other than a port of entry, may be refunded by the Secretary of the Treasury, without formal protest by the applicant, in cases where application has been made within one year from such payment. 646.
3. The act of August 3, 1882, chapter 376, known as the immigration act, confers power on the collector of customs, under proper regulations of the Secretary of the Treasury, to require the master of a vessel arriving within his collection district from a foreign country to detain all passengers on such vessel until they shall have been examined by the customs officers, for the purpose of determining the amount of head money collectible under that act from the master. 706.
4. Section 3 of said act invests the Secretary of the Treasury with power to make all necessary regulations for carrying out its provisions; and under this power he may, by regulation, forbid the landing by the master of any passenger from his vessel until an examination of all the passengers thereon is had, whether cabin or steerage. *Ibid.*
5. Detention of passengers for purposes of quarantine or tax charge is clearly within the power and duty of the master, where it is required of him by law, or by regulation pursuant to law. *Ibid.*
6. Provisions of section 9, of the act of August 2, 1882, chapter 374, called the passenger act, considered and construed in connection with the same subject. *Ibid.*

See CLAIMS, 1.

SINKING FUND.

1. The power conferred on the Secretary of the Treasury by section 5 of the act of March 3, 1887, chapter 345, to re-invest the "sinking funds" mentioned in that section, extends as much to the United States bonds then held by him as part of the sinking fund under the "Thurman Act," as to any money paid in from time to time for the purposes of that sinking fund. 491.
2. The United States bonds now in such sinking fund may be sold and the proceeds thereof re-invested in the first mortgage bonds of any of the railroad companies referred to in the said act of March 3, 1887, as having received aid from the Government in bonds. Opinion of Attorney-General Garland, of March 31, 1887 (18 Opin., 598), dissented from. *Ibid.*

SIOUX RESERVATION.

See INDIANS AND INDIAN LANDS, 18, 19.

SOUTH BOSTON IRON WORKS.

Upon the statement of facts submitted: *Advised* that the right of the South Boston Iron Works to the possession and use of certain property (two lathes and a crane) belonging to the United States, derived under an agreement with the latter, dated January 21, 1885, has terminated, and that the right to the possession of the property is now in the United States exclusively. 73.

SOUTH DAKOTA.

See DAKOTA LAND-GRANT.

SOUTHERN PACIFIC RAILROAD COMPANY.

See LAND-GRANT RAILROADS, 3.

SPECIAL EXAMINERS.

See PENSION OFFICE.

STATUTES, INTERPRETATION OF.

1. The provisions of the act of March 3, 1887, chapter 340; restricting the ownership of real estate in the Territories to American citizens, etc., apply to mines, these being real estate. 26.
2. *Advised* that the provision in the act of August 5, 1886, chapter 929, namely: "Improving Great Kanawha River, West Virginia. Continuing improvement, one hundred and eighty-seven thousand five hundred dollars," does not, by implication, authorize the purchase of land for said improvement. 34.
3. The appropriation made by the act of March 3, 1887, chapter 362 "for the erection of monuments or memorial tablets for the purpose of marking the position of each of the commands of the regular Army engaged at Gettysburg," is not applicable to the purchase of land for the sites of such monuments or tablets. 79.
4. The words "proper advertisements," as used in the act of April 15, 1886, chapter 50, mean advertisements for proposals in such cases

STATUTES, INTERPRETATION OF—Continued.

- as the general provisions of law concerning public contracts require. 96.
5. The act of March 5, 1888, chap. 23, entitled "An act for the purchase of a site, including the building thereon, etc., for the use of the office of the Chief Signal Officer of the Army," etc., does not carry with it an appropriation of money for the objects designated therein. 131.
 6. The words "exclusive of armament," as used in the first section of the act of August 3, 1886, chapter 849, are not to be understood as excluding the offensive armament, such as guns, torpedoes, etc., *only*; the term "armament" comprehending, besides those articles, such shields and protections as are directly and necessarily connected with the efficient and safe working thereof. 235.
 7. The word "sessions" in section 1852, Revised Statutes, as amended by the act of December 23, 1880, chapter 7, includes the whole period between the time fixed by law for the meeting of the legislative assemblies and their *sine die* adjournment, Sundays and intermediate adjournments not excepted. 259.
 8. The act of February 9, 1889, chapter 119, "to provide for the deposit of the savings of seamen of the United States Navy," does not extend to enlisted men of the Marine Corps. 616.
 9. The provisions of section 1 of the act of June 16, 1890, chap. 426, entitled "An act to prevent desertions from the Army, and for other purposes," are applicable to enlisted men of the Marine Corps by force and effect of section 1612, Revised Statutes; but those of sections 2, 3, and 4 of that act are inapplicable thereto. *Ibid.*
 10. The words "departmental service" and "the service," as used in the *proviso* in that part of the legislative, executive, and judicial appropriation act of July 11, 1890, chap. 667, which relates to the Civil Service Commission, mean the classified civil service as established by section 163, Revised Statutes, and section 6 of the act of January 16, 1883, chapter 27. 624.
 11. The words in the same *proviso*, viz., "promotion or appointment in other branches of the Government," signify promotion or appointment in the classified service of some other Department than that to which the applicant may belong. *Ibid.*
 12. The words "all other ores," as used in the *proviso* of paragraph 199 of the act of October 1, 1890, chapter 1244, mean all ores other than those known commercially as lead ores. 690.

STEAM ENGINEERS.

1. Section 7 of the act of February 28, 1887, chapter 272, withdraws from the operation of section 6 of that act *all* steam engineers holding Federal or State licenses. 25.
2. The alteration of a license issued under section 4441, Revised Statutes, is not an offense within sections 5418, 5479, or 5423, Revised Statutes. Revocation of the license, under section 4450, Revised Statutes, seems to be the only punishment provided by law for such case. 649.

SUBSTITUTES, EMPLOYMENT OF.

See CIVIL SERVICE. 3.

SUPREME COURT REPORTS.

1. In making up complete sets of the Supreme Court Reports for the places to be supplied under the act of February 12, 1889, chapter 135, the volumes heretofore distributed to the circuit and district judges are not to be taken into account. 312.
2. The distribution of the reports provided for by that act has no reference whatever to former distributions of reports to judges. *Ibid.*
3. Where the circuit and district courts hold their sessions in the same rooms, one set of reports only are to be provided for the places where such courts sit. But where these courts hold their sessions in different buildings, or in different rooms of the same building, a set of reports are to be provided for the place where each court sits. *Ibid.*
4. Places where the Territorial courts sit are not within the provisions of the act. *Ibid.*

SURETY.

1. Under section 7 of the act of August 3, 1886, chapter 849, authorizing proposals for certain work to be invited, which shall be subject to "such provisions as to bonds and security for the quality and due completion of the work as the Secretary of the Navy shall prescribe," the Secretary may, in his discretion, accept as surety (instead of an individual) a body corporate empowered to assume that relation. 57.
2. The American Surety Company of New York has power, under the laws of New York, to assume the relation of surety upon a bond to the United States conditioned for the faithful performance of a contract to furnish steel gun forgings to the latter. 66.
3. The Secretary of the Navy has power, under section 1383 Revised Statutes, to approve a pay-officer's bond in which the sureties are corporations, or a corporation joined with a natural person, if he deems such sureties sufficient. 175.

SUSPENSION FROM DUTY AND PAY IN CUSTOMS SERVICE.

See CLAIMS, 8.

SWAMP-LAND GRANT.

A bill in equity will not lie against the State of Minnesota for the purpose of vacating a patent issued to that State under the swamp-land grant, on the mere ground that the land thus patented was not in fact swamp land. 684.

TAXATION OF INDIAN LANDS.

See INDIANS AND INDIAN LANDS, 8, 9, 10, 11.

TAX ON NOTES USED FOR CIRCULATION.

1. The tickets issued by certain ice companies (copies of which are given in the opinion) are not "notes" within the meaning of

TAX ON NOTES USED FOR CIRCULATION—Continued.

that term as used in section 19 of the act of February 8, 1875, chapter 36, and therefore are not subject to the 10 per centum tax imposed by that section. 98.

2. Where a company or corporation made and paid out its own notes in the ordinary course of its business, not intending them to be used for circulation as money or currency, their use as such by other persons after they were paid out, without approval by the maker of such use, would not subject the maker to the tax. *Ibid.*
3. No tax, as such, is imposed on those notes which are prohibited by section 3583, Revised Statutes. The violation of this section is vindicated by fine or imprisonment, or both. *Ibid.*

TELEGRAPH.

See **POSTAL SERVICE**, 8, 9.

TELEPHONE LINES.

Telephone companies are not within the provisions of title LXV of the Revised Statutes, or entitled to avail themselves of the privileges thereby granted. 37.

TERRITORIAL LEGISLATURE.

See **TERRITORIES**, 1, 2, 3.

TERRITORIES.

1. The legislative assembly of Arizona Territory can lawfully remain in session only for a period of sixty days' duration, such period including Sundays and all intermediate adjournments. 259.
2. The word "sessions" in section 1852, Revised Statutes, as amended by the act of December 23, 1880, chapter 7, includes the whole period between the time fixed by law for the meeting of the legislative assemblies and their *sine die* adjournment, Sundays and intermediate adjournments not excepted. *Ibid.*
3. Statutory provisions regulating the assembling of Territorial legislatures reviewed; and, upon consideration thereof, advised that the governor of Arizona Territory is without power to convene a special session of the Territorial legislature. 319.
4. The act of the legislature of Arizona Territory, approved March 21, 1889, providing for the holding of a convention for the purpose of forming a State constitution to be submitted to the legal voters of the Territory for their approval or rejection, is not inconsistent with the organic act of the Territory or any other law of Congress, or with any provision of the Constitution, and is therefore valid. 335.
5. Whether such legislation is "premature" is a question that addresses itself solely to the legislature that passed, the governor who approved, and to Congress which had the power finally to ratify or annul the measure. *Ibid.*
6. Under the organic law of the Territory of Arizona and the statutes passed by the legislature thereof, the governor is not invested with power to assign to their respective districts the judges appointed for that Territory. 530.

TERRITORIES—Continued.

7. The authority given the governor by section 1873, Revised Statutes, was intended to be exercised only during that period which is embraced between the date of the organization of the Territory and the time when legislative action was had upon the subject-matter referred to in that section. After such action by the legislature the authority terminated and the operation of the section ceased. *Ibid.*

See ALASKA; ALIENS; OKLAHOMA.

TIMBER ON PUBLIC LANDS.

See TIMBER TRESPASSES.

TIMBER ON INDIAN RESERVATIONS.

See INDIANS AND INDIAN LANDS, 12, 13, 14, 22; TIMBER TRESPASSES, 5.

TIMBER TRESPASSES.

1. The cutting or destroying of timber on lands which have been patented to individual Indians is not an offense punishable under the act of June 4, 1888, chapter 340, amendatory of section 5388, Revised Statutes. 183.
2. The provisions of sections 2461, 2462, 2463, and 4751, Revised Statutes, are intended to protect and preserve live oak, red cedar, and other like timber, whether the same shall be upon land reserved or purchased by the United States for the purpose of supplying such timber for the Navy, or whether it be upon other lands of the United States, provided only that the timber is live oak, or red cedar, or other like timber, such as would be useful to the Navy for naval purposes. 381.
3. Where trespasses were committed in the State of Michigan, by cutting, destroying, removing, etc., live oak or red cedar trees, or other like timber useful for naval purposes, on and from lands belonging to the United States: Advised that informers in such cases are entitled to one-half of the penalties, etc., recovered under section 4751, Revised Statutes, bearing in mind the power given to the Secretary of the Navy in that section. *Ibid.*
4. Upon the statement of facts submitted respecting the use by the Union River Logging Railroad Company (a corporation formed under the laws of Washington Territory) of Government timber standing along the line of its road: Advised that such use of the timber was wholly unauthorized, and that proper steps should be taken to secure indemnity to the Government, and to bring to justice the individuals who have been concerned in violating the law for the protection of its property. 546.
5. Where a large quantity of standing timber (about 4,000,000 feet) was unlawfully cut by trespassers on the Fond du Lac Indian Reservation, in Minnesota, and left lying thereon—the land from which the timber was cut being held in common by the Indian bands, for whom it was reserved, by the ordinary Indian title:

TIMBER TRESPASSES—Continued.

- Advised*, (1) that the United States have the absolute ownership of the timber thus cut; (2) that the Indians have no interest therein whatever, and that it in no way appertains to the Indian Bureau or its agents to assume charge thereof; (3) that such timber may be sold for and on account of the United States, but that the sale should be made by the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. 710.
6. Opinion of Acting Attorney-General Jenks, of August 23, 1886 (18 Opin., 434), concurred in. *Ibid.*

TONNAGE DUTY.

Under the proclamation of the President, made on the 26th of January, 1888, in pursuance of the first *proviso* in section 11 of the act of June 19, 1886, chap. 421, a vessel entered in a port of the United States from Bremen, via Southampton, is exempted from payment of the tonnage tax imposed by said section, although the vessel may have taken on board cargo, passengers, and mails at the last-mentioned port. But if the vessel had entered at and cleared from Southampton it is liable to the duty. 128.

TREATIES WITH FOREIGN GOVERNMENTS.

1. The rights and privileges granted to the subjects of Greece by the first article of the treaty between the United States and that country of December 22, 1837, are guarantied to them with all the force of law. 303.
2. The word "subjects," in the treaty, embraces corporations, joint-stock companies, and other associations, commercial and industrial, constituted in conformity with the law of Greece. *Ibid.*
3. No legal objection exists to the Secretary of State instructing the United States minister at Athens to give the Government of Greece an assurance that such corporations and associations may exercise in the United States all the rights and privileges granted, as above, subject to the appropriate laws of the United States and those of the several States. *Ibid.*
4. No constitutional objection is perceived to a provision in the proposed consular convention between the United States and Great Britain, conferring upon the courts of each country jurisdiction of offenses committed on vessels of the other on the high seas. 644.

See **PATENTS FOR INVENTIONS**, 2.

TREATIES WITH INDIAN TRIBES.

1. Article 38 of the treaty of April 28, 1866, with the Choctaws and Chickasaws, which declares that "every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, etc., is to be deemed a member of said nation," does not confer upon such white person the right of suffrage. 389.

TREATIES WITH INDIAN TRIBES—Continued.

2. Whether he is entitled to such right must be determined, not by that article alone, but by the provisions of the constitution of the nation in which he may be domiciled, and its laws relating to suffrage and elections. *Ibid.*

TRANSFER.

See **ASSIGNMENT.**

TRANSPORTATION OF THE MAIL.

See **POSTAL SERVICE, 2.**

TRANSPORTATION OF TROOPS.

See **LAND-GRANT RAILROADS, 5.**

UNION PACIFIC RAILROAD COMPANY.

See **CLAIMS OF THE UNITED STATES; SINKING FUND.**

UNION RIVER LOGGING RAILROAD COMPANY.

See **LAND, PUBLIC, 9; TIMBER TRESPASSES, 4.**

UNITED STATES ATTORNEY.

See **DISTRICT ATTORNEY..**

UNITED STATES COURT FOR INDIAN TERRITORY.

See **INDIAN TERRITORY, 5.**

VACANCY IN OFFICE.

See **APPOINTMENT.**

WASHINGTON AND IDAHO RAILROAD COMPANY.

1. Under the act of May 30, 1888, chapter 336, granting to the Washington and Idaho Railroad Company a right of way through the Cœur d'Alene Indian Reservation, the Secretary of the Interior has no authority to permit the construction of a railroad across the reservation prior to the ascertainment, fixing, and payment of the compensation as provided for in section 3 of that act. 199.
2. By that section three conditions precedent are annexed to the grant, namely: (1) the plats made upon actual survey for the definite location of the road must be filed; (2) those plats must be approved in writing by the Secretary of the Interior; (3) the compensation must be fixed and paid. Until all of these conditions are performed no right of any kind respecting the right of way becomes vested in the company. *Ibid.*

WASHINGTON AQUEDUCT TUNNEL.

1. The Secretary of War may extend the time for the completion of the work on the Washington Aqueduct tunnel, under the contract with Beckwith & Quackenbush, in case the work is not completed by the 1st of November, 1888. 192.
2. The clause in the act of March 30, 1888, chapter 47, namely, "all of said work to be completed by November first, eighteen hundred and eighty-eight," is to be understood as directory merely. *Ibid.*

WASHINGTON AQUEDUCT TUNNEL—Continued.

3. Provisions of the contract with Messrs. Beckwith & Quackenbush, entered into on October 29, 1883, for the construction of a tunnel to increase the water supply of Washington, D. C., and of the agreements supplementary thereto, considered with reference to certain inquiries propounded; and *advised* (1) that should Major Lydecker, or his successor, legally appointed, with the sanction of the Chief of Engineers, annul the contract, and give notice thereof to the contractors, the right of the latter to make good the defective work may legally be denied; but so long as the contracts remain in full force the contractors have the right, at their own expense, within a reasonable time, to make the defective work good; (2) should the contracts be annulled, as above, the contractors can not be legally compelled thereafter to make the defective work good, but they can be made liable for the actual necessary expenditure which the Government may incur in making it good; (3) that to meet such liability the Government may retain any money it now has, to which the contractors would have been entitled had the work been good; (4) the expenditure authorized by the resolution of October 19, 1888, includes expenses attending the inspection of the repairs necessary to protect and preserve the work already done, but not those attending the inspection of other work. 287.

WESTERN UNION TELEGRAPH COMPANY.

See **CLAIMS OF THE UNITED STATES.**

WORLD'S COLUMBIAN COMMISSION.

See **ALASKA, 2; ARMY, 7.**

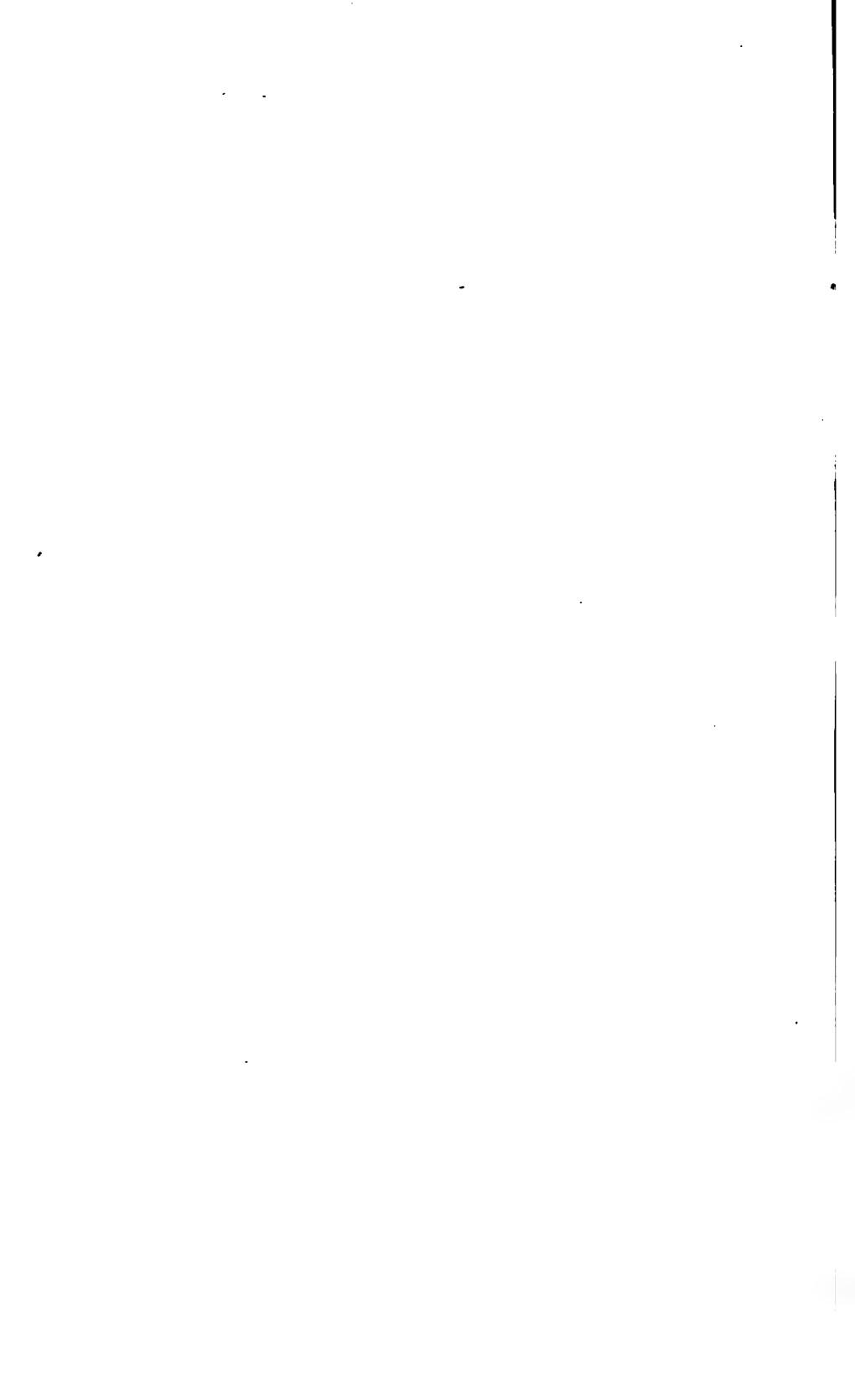
WORLD'S COLUMBIAN EXPOSITION.

The power given the President by section 16 of the act of April 25, 1890, chapter 156, to "designate additional articles for exhibition," is not limited to articles belonging to the Executive Departments and institutions therein mentioned, but extends to such other articles as he may deem fit and proper to be designated; and this power carries with it authority to employ such persons as shall be necessary to properly prepare and care for the articles which may be thus designated. 703.

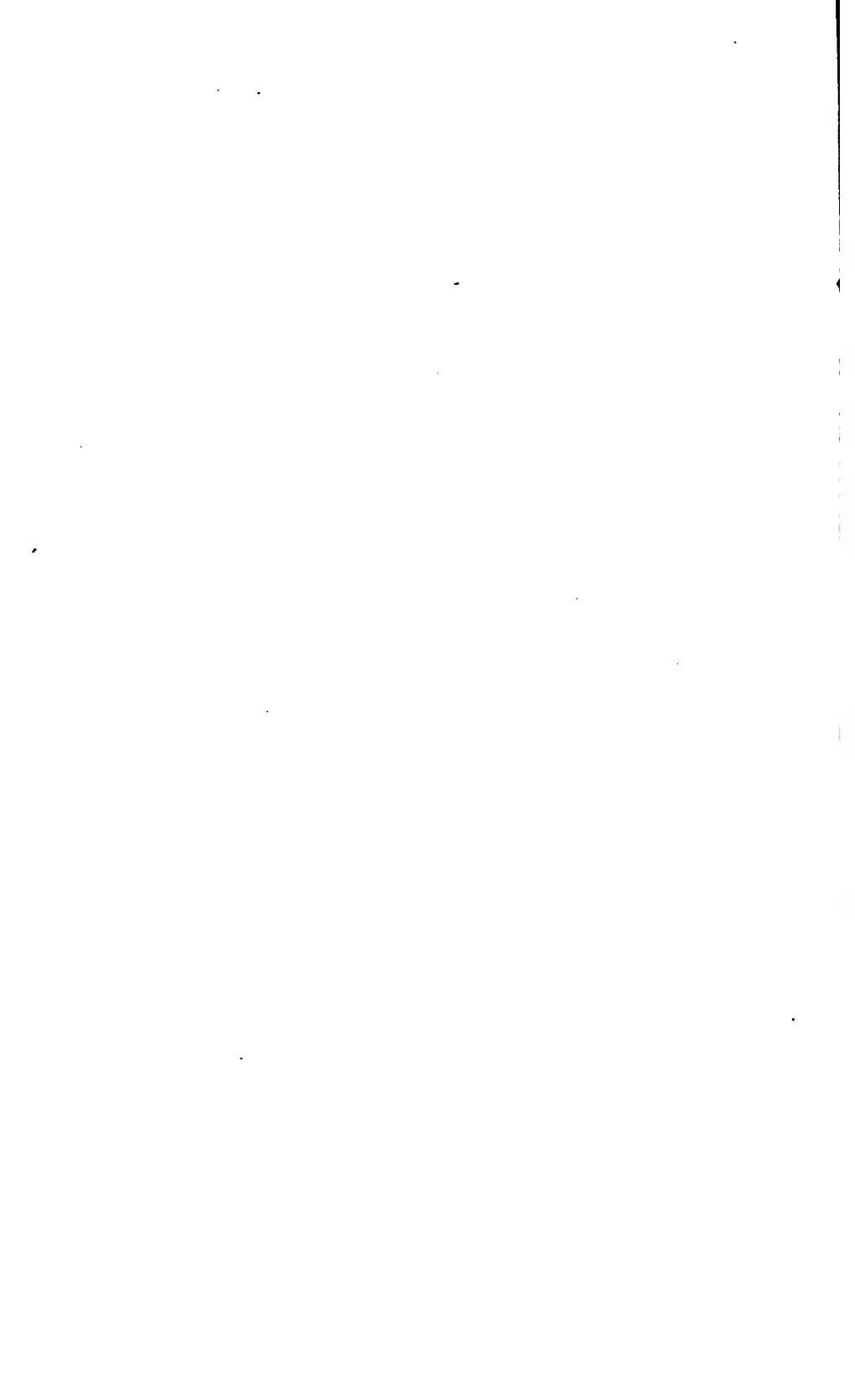
ZOOLOGICAL PARK.

Under section 4 of the act of March 2, 1889, chap. 370, the Commission thereby created have authority to defray out of the appropriation for establishing the Zoological Park all necessary expenses incidental to the selection and acquisition of the land for the park, but not to apply the appropriation to laying out the land, erecting buildings thereon, etc. The provisions of that section extend no further than the selection and acquisition of the land. 286.

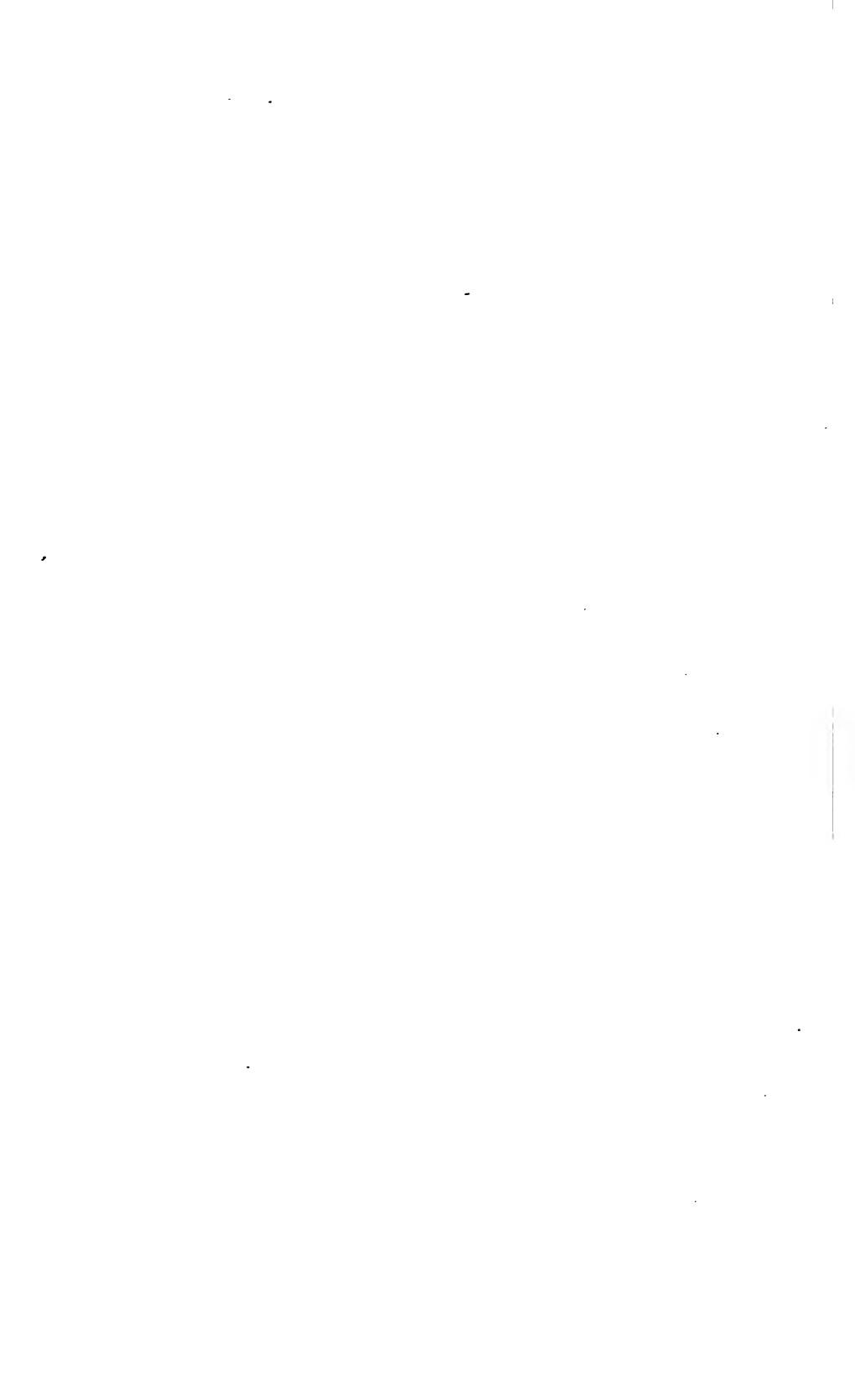






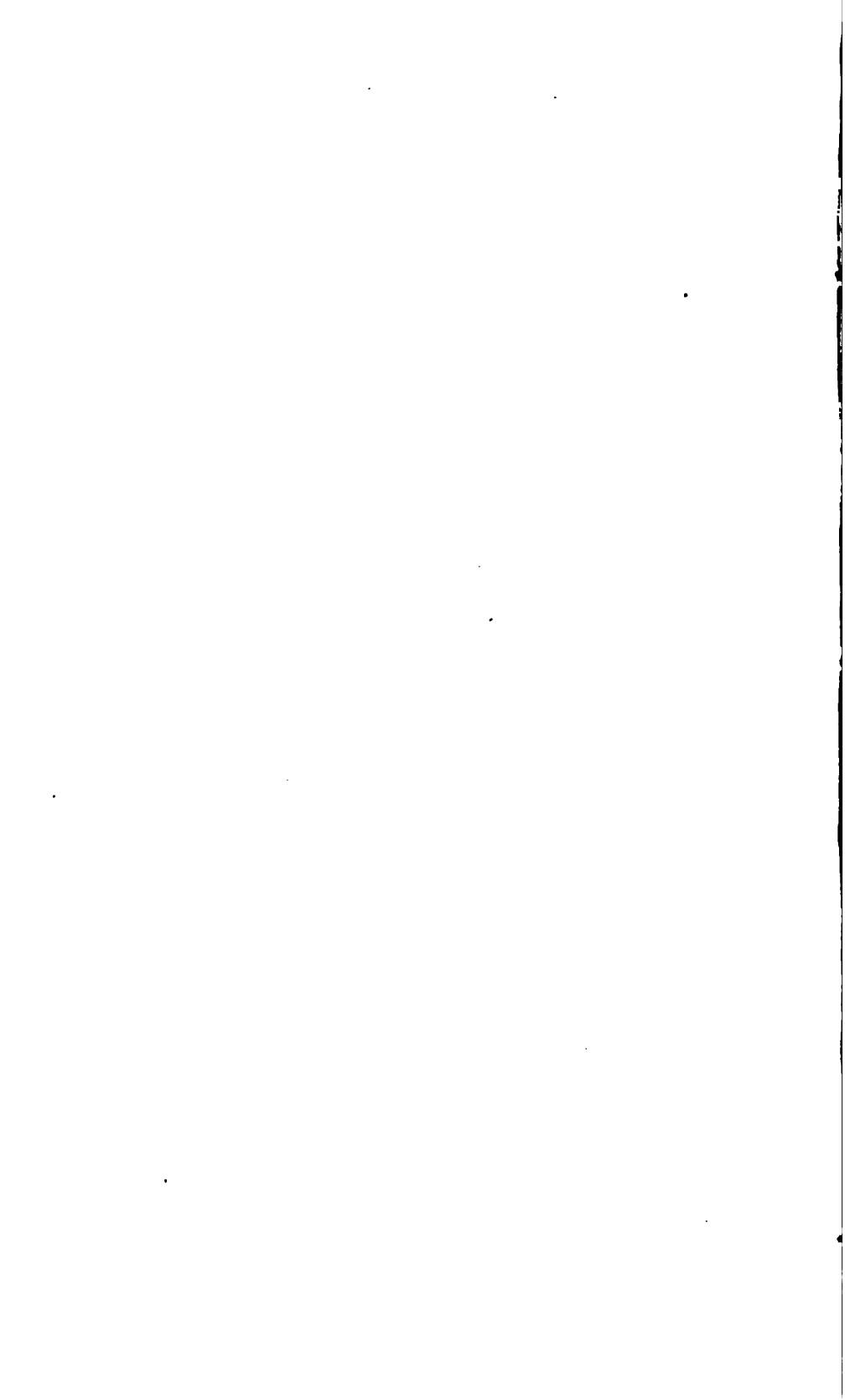
















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